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TRANSCRIPT OF RECORD

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 713

L. R. BROOKS, PETITIONER

vs.

ARCHIE J. DEWAR ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

PETITION FOR CERTIORARI FILED JANUARY 24, 1941
CERTIORARI GRANTED MARCH 10, 1941

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1940

No. 718

L. R. BROOKS, PETITIONER

vs.

ARCHIE J. DEWAR ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

INDEX

1 [File endorsement omitted.]

In District Court of the Second Judicial District of Nevada, in and for the County of Washoe

No. 53160. Dept. 1

ARCHIE J. DEWAR, EUREKA LAND & STOCK CO., A CORPORATION; JOSE SUSTACHA, PAUL GUIDICI, R. W. ANDERSON, J. F. MCKNIGHT, THOMAS W. MCKNIGHT, HARRY E. WEBB, GEORGE M. GLASER, P. J. WOLLMAN, RUTH DE REMER, S. T. WINES, ALFRED W. SMITH, C. H. RAND; JOSE ARRASCADA, DOMINGO ARRASCADA, AND JOHN ARRASCADA, DOING BUSINESS UNDER THE NAME AND STYLE OF ARRASCADA BROS.; J. M. PRUNTY, JOHN M. MARBLE, AND ROBERT E. MARBLE, DOING BUSINESS UNDER THE NAME AND STYLE OF SEVENTY-ONE RANCH, FRANK YATES, EMERY C. SMITH; D. F. GLASER, AND CLARENCE GLASER, DOING BUSINESS UNDER THE NAME AND STYLE OF D. F. AND CLARENCE GLASER; D. M. MCCUISTION, BALBINO ACHABALD, ED E. OLDHAM, SR.; M. B. GOLDSTONE, AND J. SELBY BADT, DOING BUSINESS UNDER THE NAME AND STYLE OF WARM CREEK LAND & LIVESTOCK CO.; H. MOFFAT COMPANY, A CORPORATION, UTAH CONSTRUCTION COMPANY, A CORPORATION, GEORGE HENNEN, JOS. FLYNN, FRED FERNALD, H. A. AGEE, GEORGE M. GLASER, W. H. BLAIR, K. L. REED, LETTIE FILLER, AND LIZZIE WHITNEY; EARL Q. PRUNTY, ALBERT W. GOBLE, JR., C. M. CLAYSON, ELLEN GRIFFIN; J. R. PLUMMER AND EDGAR PLUMMER, DOING BUSINESS UNDER THE NAME AND STYLE OF J. R. AND EDGAR PLUMMER; CHARLES ROCHE AND FRANK ROCHE, DOING BUSINESS UNDER THE NAME AND STYLE OF ROCHE BROTHERS; HORACE C. SHIVELEY; J. C. CUMMINS AND J. W. CUMMINS, DOING BUSINESS UNDER THE NAME AND STYLE OF CUMMINS BROS.; GEORGE A. TERRY, W. R. RAND, HIBERNIA SAVINGS & LOAN SOCIETY, A CORPORATION; S. C. WEEKS AND S. J. WEEKS; A. G. MCBRIDE; BARNEY MONASTERIOR; J. B. GARAT, SR.; GEO. W. GARAT, HENRY S. GARAT AND J. B. GARAT, JR., DOING BUSINESS UNDER THE NAME AND STYLE OF GARAT & CO., PLAINTIFFS.

VS.

L. R. BROOKS, DEFENDANT

Complaint for injunction

Filed June 15, 1936

2 Plaintiffs complain of defendant and for their cause of action and bill of complaint in equity allege:

1. That all of the individual plaintiffs hereinabove named are residents and each of them is a resident of the State of Nevada,

and a citizen of the United States and of said state. Plaintiff Eureka Land & Stock Company is a Corporation organized under the laws of the State of Nevada, with its principal office at Eureka, Eureka County, Nevada, Jose Arrascada, Domingo Arrascada, and John Arrascada are co-partners doing business under the firm name and style of Arrascada Bros., John M. Marble and Robert E. Marble are co-partners doing business under the name and style of Seventy-One Ranch. D. F. Glaser and Clarence Glaser are co-partners doing business under the name and style of D. F. and Clarence Glaser; M. B. Goldstone and J. Selby Badt are co-partners doing business under the name and style of Warm Creek Land & Livestock Co.; H. M. Moffat Company is a corporation organized and existing under the laws of the State of California, and having its principal office in the City and County of San Francisco, State of California, and having and maintaining an office at Reno, Washoe County, Nevada. Utah Construction Company is a corporation organized and existing under the laws of the State of Utah, having its principal office at Ogden, Weaver County, Utah, and maintaining an office at Montello, Elko County, Nevada; J. R. Plummer and Edgar Plummer are co-partners doing business under the name and style of J. R. and Edgar Plummer. Charles Roche and Frank Roche are co-partners doing business under the name and style of Roche Brothers. J. C. Cummins and J. W. Cummins are co-partners doing business under the name and style of Cummins Bros. Hibernia Savings & Loan Society is a California corporation owning property in the State of

3 Nevada. All of the said individuals, partnerships, and corporations now are and for many years continuously last past preceding the commencement of this action have been engaged in the business of breeding, raising, grazing, and selling livestock within the State of Nevada, and within Grazing District No. 1 in said State, hereinafter more particularly described.

4 2. The defendant, L. R. Brooks, is the duly appointed Acting Regional Grazier of the United States for Region Three, which includes the State of Nevada, and is a citizen and resident of the United States and resides in Reno, Nevada. The defendant Brooks is sought to be restrained from enforcing certain rules which the Director of Grazing of the United States has promulgated by the order and with the approval of the Secretary of the Interior of the United States. In promulgating and ordering and approving the promulgation of said rules, the Director of Grazing and the Secretary of the Interior purported to act under authority of the Act of Congress of June 28, 1934 (48 Stat. 1269; 43 U. S. C. A. 315–315n), entitled, "An Act to Stop Injury to the Public Grazing Lands by Preventing

Overgrazing and Soil Deterioration, to Provide for Their Orderly Use, Improvement and Development, to Stabilize the Livestock Industry Dependent upon the Public Range, and for Other Purposes," commonly known as "The Taylor Grazing Act." (Said Act, sometimes hereinafter is referred to as "said Act of June 28, 1934," and a copy thereof is annexed to this Bill of Complaint as "Exhibit A.") In fact, however, said rules are illegal and void because the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate or to order or approve the promulgation of said rules, and therefore the enforcement of said rules, if accomplished, would not be the official act of the United States by its Acting Regional Grazier.

3. The plaintiffs file this Bill of Complaint on behalf of all of the said plaintiffs jointly and on behalf of each and every one of said plaintiffs severally, and on behalf of all persons similarly situated. The interests and the causes of action of the said plaintiffs and the relief sought on behalf of each of said plaintiffs are identical in all respects. The said plaintiffs and those persons similarly situated are so numerous as to make it impracticable to bring all such persons before said court and it is impracticable for each one of said plaintiffs, and every other person similarly situated, to bring a separate action seeking relief similar to that herein prayed for. Unless plaintiffs may bring this action thus on behalf of themselves individually and jointly and on behalf of all persons similarly situated, there will be a multiplicity of suits, and both the plaintiffs and the defendant Brooks will suffer great inconvenience, and additional and unnecessary cost and expense.

4. It is economically impossible for stockmen situated like the plaintiffs to own or lease all the grazing land necessary to feed their livestock. For many years, therefore, it has been the practice of such stockmen to own or lease only a relatively small portion of grazing land, and to use certain vacant, unappropriated, and unreserved public lands of the United States (hereinafter sometimes referred to as "the public range") to satisfy the rest of their grazing requirements. Such stockmen have built up their business in reliance upon their ability to use portions of the public range in this way. The capitalization and indebtedness of such stockmen, the amount of their state and local taxes, their competitive positions relative to other stockmen, the price structure of the market in which they sell their livestock, all have been fixed and determined by the extent to which such stockmen have been able to graze their livestock on the public range. It would be impossible for stockmen situated like the plaintiffs to continue in business if their ability to graze livestock upon the

public range were impaired or interfered with to any appreciable extent.

5. In accordance with the practice described above, the plaintiffs have, since long prior to the passage of said Act of June 28, 1934, been grazing their livestock upon certain portions of the public range in Elko, Eureka, and Lander Counties, Nevada. Each of the plaintiffs owns or leases companionate agricultural and grazing properties used in connection with such use of the public range, and each of the plaintiffs owns vested rights to the use of water on the public range itself for watering livestock. The agricultural and grazing lands which plaintiffs own and lease are entirely inadequate to support their livestock, and it has always been and still is indispensable to the conduct of the plaintiffs' businesses that they be allowed to use the public range in this way. Further, the public range in itself has no value unless used in connection with agricultural and grazing properties of like nature as those owned and operated by the plaintiffs and in connection with the ownership of the right to the use of water for stockwatering purposes, such as the stockwatering rights of plaintiffs. As the value of the ranch properties, livestock, and stockwatering rights of the plaintiffs is dependent upon the use of the public range, so is the value of the public range dependent upon the industries and businesses built up by investment in agricultural and grazing lands, livestock, stockwatering rights, and other operating properties by the plaintiffs and other stockmen similarly situated. During all the times above mentioned, and at least until May 31, 1935, plaintiffs were impliedly licensed by the United States to graze their livestock on said portions of the public range. Except as described hereinafter, the United States has never revoked or modified the said implied licenses of the plaintiffs.

6. In general, the public range in Nevada is the most dependent upon appropriated water and companionate agricultural and grazing lands of any public grazing lands in the United States.

7 The portions of the public range on which plaintiffs graze their livestock are wholly dependent upon appropriated water and companionate lands for economical and beneficial use, and it is necessary to invest large sums in improvements of headquarters units, water rights, winter feed facilities, etc., before livestock can be raised successfully. Most of the cattle produced by plaintiffs and other stockmen similarly situated are what is known as "feeders," that is, cattle which must be fattened in some other section of the country before they are fit for slaughter. Furthermore, because of the erratic production of feed on Nevada ranges due to semiarid climatic conditions and the great extreme of changes in temperature and

moisture, on the average less than twenty out of every hundred head of cattle raised can be marketed as feeders each year and the receipts from these cattle must pay for the expense of supporting the entire one hundred head. The sheep raised by plaintiffs and others similarly situated must be ranged on special lambing grounds in spring; must be "lambed" before shearing or shorn before "lambing," depending entirely on weather conditions; must be taken to the higher mountains for summer range; the lambs shipped to market in Fall; the ewes trailed to the winter range depending while on the trail on snow for watering, and in Spring again trailed north for shearing and lambing. Such perennial trailing to and from one winter range, and such shearing and lambing in adverse weather conditions, often subjects the bands of sheep to losses ranging from a small percentage to as great as seventy-five per cent. In addition to such adverse conditions, when the steers thus raised and the lambs thus raised are ready for market, they must be disposed of irrespective of the prices offered for same. The margin of profit, by reason of such conditions, both as to sheep and cattle, is so small that the imposition of additional charges of overhead or operating costs, even though appearing nominal, threaten to destroy said
8 industries in the said Grazing District No. 1.

7. On April 8, 1935, the Secretary of the Interior, acting under and in accordance with the provisions of said Act of June 28, 1934, issued an order establishing a grazing district to be known as "Nevada Grazing District No. 1," embracing portions of Elko, Eureka, and Lander Counties, Nevada. The said Nevada Grazing District No. 1 included large portions of the public range upon which the plaintiffs had theretofore grazed their livestock under implied licenses from the United States.

8. On May 31, 1935, the Director of Grazing, acting by the order and with the approval of the Secretary of the Interior, and purporting to act under authority conferred upon the Secretary of the Interior by Section 2 of said Act of June 28, 1934, promulgated certain rules entitled, "Circular No. 2 Rules for the Guidance of District Advisors in Recommending the Issuance of Grazing Licenses." (Said rules sometimes hereinafter are referred to as "Said Circular No. 2.") By said Circular No. 2 the Director of Grazing required all persons grazing their livestock within grazing districts to obtain from the Director of Grazing temporary licenses to do so. No fees were to be charged for the temporary licenses required by said Circular No. 2.

9. In accordance with the provisions of said Circular No. 2, plaintiffs, to protect their rights, duly applied for and obtained temporary licenses to graze their livestock upon the public range

until July 1, 1936. Thereafter plaintiffs' temporary licenses were extended until May 1, 1936.

10. On or about January 1, 1936, the Secretary of the Interior called a conference of delegates from each of the grazing districts theretofore created under said Act of June 28, 1934, to be held at Salt Lake City, Utah, on January 13 and 14, 1936. At said conference the Director of Grazing asked the assembled delegates to advise him whether fees should be charged for new temporary licenses to graze livestock within the grazing districts, and, if so, what the amount of the fees should be. The Director of Grazing suggested that it was desirable to charge a uniform fee of five cents per month for each head of cattle and one cent per month for each head of sheep. Thereupon many delegates, and especially delegates from Nevada Grazing District No. 1 objected to the imposition of such fees. In the first place, said delegates pointed out that said Act of June 28, 1934, did not authorize the Secretary of the Interior to charge any fees whatsoever for mere temporary licenses. In the second place, said delegates pointed out that the conditions of various portions of the public range differed greatly one from the other and that all stockmen ought not to be charged the same uniform fees regardless of the portion of the public range where they grazed their livestock. In the third place, said delegates pointed out that as to certain portions of the public range, especially those portions situated in Nevada Grazing District No. 1, a fee of five cents per month for each head of cattle, and a few of one cent per month for each head of sheep, would be utterly unreasonable at the present time, because, under present conditions, the privilege of grazing livestock on such portions of the public range was not worth the payment of such a fee, and because the payment of such a fee would not permit stockmen situated like the plaintiffs to sell their livestock at a profit or to meet competitive conditions, or to obtain the credit necessary to operate their businesses. Nevertheless, the Director of Grazing purported to find that a majority of the delegates present were in favor of charging a uniform fee of five cents per month for each head of cattle, and a fee of one cent per month for each head of sheep, grazed within a grazing district. The Director of Grazing did not attempt to determine the reasonableness or unreasonableness of such a fee as applied to particular portions of the public range.

11. After said conference on January 13 and 14, 1936, and before March 2, 1936, plaintiffs and other stockmen from Nevada Grazing District No. 1 protested repeatedly to the Director of Grazing and to his agents that, as to the portions of the public range on which they had theretofore grazed their livestock, the

proposed fees would be utterly unreasonable. The Nevada State Cattle Association, a trade association representing many of the cattlemen of Nevada, including most of the plaintiffs, repeatedly called attention to the unreasonableness of such a fee in the case of portions of the public range within Nevada Grazing District No. 1. Representatives of the said Nevada Cattle Association interviewed the Director of Grazing in Washington and there submitted to him both oral and written reasons why such a fee would be unreasonable as applied to such portions of Nevada Grazing District No. 1.

12. On March 2, 1936, the Director of Grazing, acting by the order and with the approval of the Secretary of the Interior, and purporting to act under authority conferred on the Secretary of the Interior by Section 2 of said Act of June 28, 1934, promulgated certain rules entitled, "Rules for Administration of Grazing Districts." (Said rules hereinafter sometimes are referred to as "said Rules of March 2, 1936," and a copy thereof is annexed to this Bill of Complaint as "Exhibit B.") By said Rules of March 2, 1936, the Director of Grazing, in spite of the protests and objections described above, purported to provide, among other things:

(a) That the Division of Grazing of the Department
11 of the Interior should issue to certain qualified applicants new temporary licensee to graze livestock upon the public range within the grazing districts theretofore established until the end of the so-called winter grazing season of 1936–1937 or until May 1, 1937, or until the issuance of "permits" within the meaning of Section 3 of said Act of June 28, 1934, whichever should be sooner;

(b) That a fee of five cents per month or fraction thereof for each head of cattle, and a fee of one cent per month for each head of sheep, should be collected from each licensee grazing his livestock on the public range within a grazing district (said fee being sometimes hereinafter referred to as "the grazing fee"); and

(c) That, after the issuance of said new temporary licenses, all stockmen should be prohibited from grazing livestock upon or driving them across the public range within a grazing district without such a license.

13. At the time of the promulgation of said Rules of March 2, 1936, the grazing lands which plaintiffs held in fee of leasehold were wholly insufficient to support their livestock until they were ready for market or for winter feeding on the land of plaintiffs. Unless, therefore, plaintiffs obtained new temporary licenses to graze their livestock upon the public range, said livestock either would have died of starvation or would have become so weakened

and unfit that they could not be sold in the market at any price, otherwise carried over to the winter feeding season upon the lands of plaintiffs. Accordingly, plaintiffs applied for new temporary licenses to graze their livestock upon the public range within Nevada Grazing District No. 1, as required by said Rules of March 2, 1936. Plaintiffs' applications showed
12 that they were duly qualified to obtain such new temporary licenses. On or about May 1, 1936, plaintiffs were notified by the Register of the District Land Office that such new temporary licenses would be granted to them upon the payment of the first instalments, to-wit, one-half of the grazing fees for their respective livestock for the entire grazing season of 1936–1937. On May 25, 1930, the defendant Brooks sent a notice to the plaintiffs and to all other stockmen who had applied for new temporary licenses to graze their livestock on the public range within Nevada Grazing District No. 1. By said notice, (a copy of which is annexed hereto as "Exhibit C") defendant Brooks informed the plaintiffs and such other stockmen that unless they paid the first installments of their 1936–1937 grazing fees and obtained their new temporary licenses by June 15, 1936, they would be considered in trespass under said Act of June 28, 1934, and would be punished by a fine of not more than $500 as provided by said Act.

14. The said Rules of March 2, 1936, are illegal and void because the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate or to order or to approve the promulgation of said rules, in that:

(a) Section 2 of said Act of June 28, 1934, gives the Secretary of the Interior no authority, power, or jurisdiction to issue the temporary licenses required by said Rules of March 2, 1936, or to require such licenses as a prerequisite to grazing livestock on the public range within a grazing district;

(b) Section 2 of said Act of June 28, 1934, gives the Secretary of the Interior no authority, power or jurisdiction to charge
13 any fee whatsoever for the temporary licenses required by said Rules of March 2, 1936;

(c) The new temporary licenses required by said Rules of March 2, 1936, are not permits within the meaning of Section 3 of said Act of June 28, 1934, authorizing the Secretary of the Interior to issue permits to graze livestock upon the public range within grazing districts.

(d) The grazing fees required to be paid by said Rules of March 2, 1936, were fixed without any attempt to determine what would be a reasonable fee in each case, as required by Section 3 of said Act of June 28, 1934. Neither the Secretary of the Interior nor the Director of Grazing nor any other official of the

Division of Grazing of the Department of the Interior ever made any attempt to ascertain the character of the public range used in any particular case, the type of feed thereon, the distribution thereof of water available for livestock, the economic condition of the particular stockmen dependent thereon, the respective abilities of the stockmen dependent thereon to meet commercial competition, the existing market prices for the various types of livestock, the distance of such range from shipping facilities, or any other standard of reasonableness in each case. Instead, they purported to be guided by the proceedings in the above-described conference at Salt Lake City, Utah, on January 13 and 14, 1936, where there had been no determination of the facts as to any particular portion of the public range, and no opportunity for delegates from particular grazing districts to record their dissent from what the Director of Grazing purported to find to be the opinion of a majority of the delegates assembled from thirty-four grazing districts, representing the widest

14 possible variations in the factors which affect the reasonableness of grazing fees. In fact, the various portions of the public range within the various grazing districts vary so widely in quality and general characteristics that a fee which is reasonable as to one grazing district is not reasonable as to another district, and a fee which is reasonable as to one portion of a grazing district is not reasonable as to another portion of the same grazing district. The grazing fees for the season of 1936–1937 assessed against the plaintiffs herein, to wit, five cents per head per month for cattle, and one cent per head per month for sheep, are the same and identical fees as those assessed against persons grazing livestock on the public range in districts in other states in which the value of the use of the range and the value of the feed thereon is many times greater than the value thereof in the portions of the public range allotted to plaintiffs. The portions of the public range sought to be used by the plaintiffs are so dependent, for economical and beneficial use of available feed, upon water rights which are vested in the plaintiffs, and the companionate agricultural and grazing land holdings of said plaintiffs, that the fee required to be paid by said Rules of March 2, 1936, does not represent a reasonable exaction for the privilege of using the range at the present time and under existing conditions. Furthermore, under the conditions described hereinabove in paragraph 7, the additional cost imposed by the grazing fees required by said Rules of March 2, 1936, will make it impossible for plaintiffs and other stockmen similarly situated to sell their livestock at a profit.

15 (e) The new temporary licenses required by said Rules of March 2, 1936, expressly state that they are temporary

and revocable without any qualifications or restrictions upon such right of revocation, whereas Section 3 of said Act of June 28, 1934, requires that the permits which the Secretary of the Interior is authorized to issue thereunder shall be for a fixed period;

(f) None of the new temporary licenses required by said Rules of March 2, 1936, carries with it any right of renewal, whereas Section 3 of said Act of June 28, 1934, provides that permittees complying with the rules and regulations laid down by the Secretary of the Interior shall not be denied the renewal of the permits which the Secretary of the Interior is authorized to issue thereunder, if such denial will impair the value of the grazing units of the permittees when such units are pledged as security for bona fide loans;

(g) Said new temporary licenses provide that the same are revocable without qualification or restrictions on such right of revocation, despite the fact that in the incidental exercise of such new temporary licenses the said licensees will also exercise their vested rights to the use of water on the public range for watering their said stock by reason of the appropriation and use thereof, and by reason of permits to use the same granted by the State Engineer of the State of Nevada, and despite the fact that it is provided in Section 3 of said Act that the same shall not be construed as in any way diminishing or impairing the right to the use of water for such purposes.

(15) Nevertheless, notwithstanding the fact that said
16 Rules of March 2, 1936, are illegal and void, and notwithstanding the fact that the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate, or to order or to approve the promulgation of, said rules, the District Land Office refuses to issue to plaintiffs their new temporary licenses unless and until the plaintiffs pay the first instalments of their grazing fees for the 1936–1937 grazing season, and the defendant Brooks threatens to enforce said rules by preventing the plaintiffs from grazing their livestock on those portions of the public range in Nevada Grazing District No. 1, heretofore for many years used by them for that purpose, unless plaintiffs pay the grazing fees assessed against them and obtain the new temporary licenses required by said rules; and the defendant Brooks threatens plaintiffs that, if they attempt to graze their livestock on the public range within Nevada Grazing District No. 1 without paying such grazing fees and obtaining new temporary licenses, plaintiffs will be subject to an action for trespass and to a fine of not more than $500 and to the other liabilities and penalties provided in said Act of June 28, 1934.

16. Unless the defendant Brooks is restrained from enforcing said Rules of March 2, 1936, the plaintiffs will be deprived of their property without due process of law, in violation of the Fifth Amendment to the Constitution of the United States, inasmuch as the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate, or to order or approve the promulgation of, said rules.

17. Unless the defendant Brooks is restrained from
17 enforcing said Rules of March 2, 1936, the plaintiffs will suffer great damage and irreparable injury for which there is no plain or adequate or speedy remedy at law, in that:

(a) Plaintiffs are informed and believe that the defendant Brooks is financially unable to respond in damages for any injury he may inflict on plaintiffs in enforcing, or attempting to enforce, the said illegal and void Rules of March 2, 1936;

(b) If plaintiffs, in order to protect their rights to graze livestock on the public range, pay the grazing fees assessed against them under said illegal and void Rules of March 2, 1936, under protest, there will be no way in which they can recover back such fees in a suit against the United States or against any officer thereof. Under Section 10 of said Act of June 28, 1934, the said grazing fees to be collected from plaintiffs and each of them as aforesaid will be deposited in the Treasury of the United States as miscellaneous receipts, and 25 per centum thereof will be retained by said Treasury; 25 per centum thereof, when appropriated by Congress for the purpose will be expended by the Secretary of the Interior for construction, purchase, and maintenance of improvements; and 50 per centum thereof will be paid by the Secretary of the Treasury to the State of Nevada, and will thereafter be expended as the State Legislature of said State prescribes, for the benefit of the counties in which the said grazing districts are situated. Thus the plaintiffs will have the said 50 per centum of the proceeds of their grazing fees allocated
to and expended within the counties of Elko, Eureka and
18 Lander in said State. The 25 per centum thus retained in the United States Treasury will be subject to the official custody of the Treasurer of the United States. The 25 per centum appropriated by Congress for expenditure by the Secretary of the Interior will be subject to the official control of the Secretary of the Interior. The 50 per centum paid to the Treasury of the State of Nevada will be under the special control and in the official custody of the Treasurer of the State of Nevada until allocated to the respective counties for expenditure as provided in said Act. When said 50 per centum shall be properly allocated to the respective counties, sundry proportions of said 50 per centum will be in the hands of the respective county treasurers

of the respective counties comprising the said Nevada Grazing District No. 1. Each of the said counties is governed by a legislative board known as the Board of County Commissioners, whose resolutions and regulations will govern the expenditure and distribution of the said county's portion of the said 50 per centum allocated to it. Plaintiffs are informed and believe that, unless afforded the relief of injunction as herein prayed, and if they are compelled to pay the said grazing fees under threat of penalties of fine and imprisonment, as well as the prosecution of civil actions against them, and if they are compelled to institute suit to recover back the license grazing fees so paid, they will be obliged, and each of said plaintiffs will be obliged, to bring separate suits against each one of the said several bodies, officials, and political subdivisions receiving a proportionate share of the said grazing fees, thereby necessitating a multiplicity of suits; that the proporton of the proceeds of the grazing fees which would
19 go to the United States and to the State of Nevada could not be collected back by any legal proceeding whatsoever; that if repayment of said fees could be compelled from each of the said respective counties after allocation of their proper proportions to them, such payment would probably not cover the cost, including commissions and fees, involved in the collection thereof, and that by reason of said facts plaintiffs would be, and each of said plaintiffs would be, subjected to great and irreparable injury for which there is and would be no plain or speedy or adequate remedy at law.

(c) If plaintiffs are forced to pay the grazing fees assessed against them under said illegal and void Rules on March 2, 1936, under protest, and to rely on their ability to recover back the sums so paid from the defendant Brooks, or from the various federal, state, and local authorities who receive the proceeds thereof, the plaintiffs will suffer great inconvenience and expense in conducting their businesses during the coming year, and, as to some of the plaintiffs, their businesses will be disrupted entirely, and it will be impossible for such plaintiffs to obtain the money necessary to operate their businesses during the coming year. Each and every one of the plaintiffs, for the purpose of meeting his overhead expenses and operating costs and expenses in the said business of raising and selling livestock, is strictly limited to definite sources of income. As to a large group of said plaintiffs, they are, and each of them is, financed through borrowed money lent to them by the Regional Agricultural Credit Corporation of Salt Lake City, Utah, the Nevada Livestock Production Credit Association, or other
20 similar governmental loan agencies engaged in the business of lending funds of the Reconstruction Finance Cor-

poration of the United States of America, by accepting the notes of said plaintiffs in said class and rediscounting the same with the said Reconstruction Finance Corporation, the Federal Reserve Bank, the Federal Intermediate Credit Bank, or other government bank agencies. Such funds, lent as aforesaid for overhead and operating costs, are limited by what is known as a "Budget Allowance" set up and fixed at the beginning of the loan term, and are allowable and payable in fixed, agreed amounts monthly during said term, and no funds in excess of said budget allowances are available to such plaintiffs. At the time the budgets were fixed and allowed for all plaintiffs in said class, no attempt had been made to levy or to collect any grazing fees as a condition precedent to the right of said plaintiffs to graze their livestock on the public range, and, accordingly, no such item of grazing fees was or is provided for in such budgets. Such plaintiffs in such class have no other means of income and are therefore unable to pay said grazing fees. As to the remainder of said plaintiffs, not financed as aforesaid through such government loan agencies, their sources of revenue for payment of overhead and operating expenses are nevertheless limited to fixed and definite available sums. Such sums in like manner as the available funds of those plaintiffs financed through Government agencies as aforesaid, are definitely allocated to definite overhead or operating expenditures, and there is no surplus or overplus after such allocation and application. Such plaintiffs are entirely unable to pay the said grazing license fees;

(d) If plaintiffs fail to pay the grazing fees assessed against them under said illegal and void Rules of March 2, 1936, and defendant Brooks attempts to enforce said rules, each of the plaintiffs will be subjected to a fine of not more than $500 and to other penalties provided by said Act of June 28, 1934, and plaintiffs will be barred from grazing their livestock on the public range within Nevada Grazing District No. 1. In that event, plaintiffs' livestock will die of starvation, and plaintiffs will lose the large sums of money which they have invested in said livestock, and in agricultural and grazing lands, improvements, water rights, dams, ditches, canals, reservoirs, dipping vats, and other real and personal property.

18. The payments assessed against plaintiffs for the grazing season of 1936–1937 are in the respective amounts for the respective first and second instalments and in the respective total sums as set forth in Exhibit D hereto annexed and hereby referred to and made a part hereof. The respective first and second instalments and totals set forth in said Exhibit D are the amounts claimed to be payable and which remain unpaid

by the respective plaintiffs. In default of the respective payments of the first instalments, where the same are unpaid, and in default of the respective payments of the second instalments, which will become due upon demand of the defendant in the fall of 1936, or sooner, the said plaintiffs will, in accordance with the said rules and notices as set forth in paragraph 12 and 13 of this complaint, be subjected to the penalties, forfeitures of their rights to use the public range, etc., as hereinabove more particularly set forth.

Wherefore, Plaintiffs pray:

First. That a writ of subpoena issue directed to the defendant Brooks, commanding him to appear and answer the allega-
22 tions contained in this Bill of Complaint and to abide by and perform such orders or decrees as the Court or the Judge thereof may make in the premises.

Second. That the Court, upon the final hearing of this cause, adjudge and decree that the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate, or to order or approve the promulgation of, said Rules of March 2, 1936, requiring the plaintiffs to pay the fees as herein set forth as a prerequisite to grazing their livestock upon the public range within Nevada Grazing District No. 1 under the said temporary revocable licenses.

Third. That upon the final hearings of this cause the defendant Brooks be perpetually enjoined from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 in default of payment of the said grazing fee of five cents per month or fraction thereof per head of cattle, and one cent per month or fraction thereof per head of sheep, grazed upon such public range, and in default of obtaining a new temporary license as required by said Rules of March 2, 1936.

Fourth. That an order to show cause be issued by said Court, ordering and commanding the said defendant Brooks to be and appear before said Court, at a time and place to be fixed in said order, and then and there show cause why he should not be enjoined and restrained, during the pendency of this action, from the commission of the acts mentioned in paragraph Third of the prayer of this complaint.

Fifth. That a temporary restraining order issue forthwith directed to the said defendant Brooks, enjoining and restraining him, pending the hearing of said order to show cause
23 and until the further order of the court, from the commission of the acts described in paragraph third of the prayer of this complaint.

Sixth. That plaintiffs have such other further and general relief as the nature of the case may require, and as the Court, or Judge thereof, may deem proper.

MILTON B. BADT,
Milton B. Badt,
Elko, Nevada.
Attorney for the Plaintiffs.

DONOVAN, LEISURE, NEWTON & LUMBARD,
WILLIAM J. DONOVAN,
CARL E. NEWTON,
HIRAM E. WOOSTER,
JOHN HOWLEY,
2 Wall Street, New York, New York,
Of Counsel.

24 [*Duly sworn to by Archie J. Dewar; jurat omitted in printing.*]

25 *Exhibit "A" to complaint*

[PUBLIC—No. 482—73D CONGRESS]

[H. R. 6462]

AN ACT

To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled, That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of eighty million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: Provided, That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. Nothing in this Act shall be construed in any way to diminish, restrict, or impair any right which has been heretofore or may be hereafter initiated under existing law val-

idly affecting the public lands, and which is maintained pursuant to such law except as otherwise expressly provided in this Act, nor to affect any land heretofore or hereafter surveyed which, except for the provisions of this Act, would be a part of any grant to any State, nor as limiting or restricting the power or authority of any State as to matters within its jurisdiction. Whenever any grazing district is established pursuant to this Act, the Secretary shall grant to owners of land adjacent to such district, upon application of any such owner, such rights-of-way over the lands included in such district for stock-driving purposes as may be necessary for the convenient access by any such owner to marketing facilities or to lands not within such district owned by such person or upon which such person has stock-grazing rights. Neither this Act nor the Act of December 29, 1916 (39 Stat. 862; U. S. C., title 43, secs. 291 and following), commonly known as the "Stock Raising Homestead Act", shall be construed as limiting the authority or policy of Congress or the President to include in national forests public lands of the character described in section 24 of the Act of March 3, 1891 (26 Stat. 1103; U. S. C., title 16, sec. 471), as amended, for the purposes set forth in the Act of June 4, 1897 (30 Stat. 35; U. S. C., title 16, sec. 475), or such other purposes as Congress may specify. Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attendance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: Provided, however, That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such graz-

ing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: Provided, That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long

as the emergency exists: Provided further, That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

SEC. 4. Fences, wells, reservoirs, and other improvements necessary to the care and management of the permitted livestock may be constructed on the public lands within such grazing districts under permit issued by the authority of the Secretary, or under such cooperative arrangement as the Secretary may approve. Permittees shall be required by the Secretary of the Interior to comply with the provisions of law of the State within which the grazing district is located with respect to the cost and maintenance of partition fences. No permit shall be issued which shall entitle the permittee to the use of such improvements constructed and owned by a prior occupant until the applicant has paid to such prior occupant the reasonable value of such improvements to be determined under rules and regulations of the Secretary of the Interior. The decision of the Secretary in such cases is to be final and conclusive.

SEC. 5. That the Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; and provided that so far as authorized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act.

SEC. 6. Nothing herein contained shall restrict the acquisition, granting, or use of permits or rights-of-way within grazing districts under existing law; or ingress or egress over the public lands in such districts for all proper and lawful purposes; and nothing herein contained shall restrict prospecting, locating, developing, mining, entering, leasing, or patenting the mineral resources of such districts under law applicable thereto.

SEC. 7. That the Secretary is hereby authorized, in his discretion, to examine and classify any lands within such grazing districts which are more valuable and suitable for the production of

agricultural crops than native grasses and forage plants, and to open such lands to homestead entry in tracts not exceeding three hundred and twenty acres in area. Such lands shall not be subject to settlement or occupation as homesteads until after same have been classified and opened to entry after notice to the permittee by the Secretary of the Interior, and the lands shall remain a part of the grazing district until patents are issued therefor, the homesteader to be, after his entry is allowed, entitled to the possession and use thereof: Provided, That upon the application of any person qualified to make homestead entry under the public-land laws, filed in the land office of the proper district, the Secretary of the Interior shall cause any tract not exceeding three hundred and twenty acres in any grazing district to be classified, and such application shall entitle the applicant to a preference right to enter such lands when opened to entry as herein provided.

SEC. 8. That where such action will promote the purposes of the district or facilitate its administration, the Secretary is authorized and directed to accept on behalf of the United States any lands within the exterior boundaries of a district as a gift, or, when public interests will be benefited thereby, he is authorized and directed to accept on behalf of the United States title to any privately owned lands within the exterior boundaries of said grazing district, and in exchange therefor to issue patent for not to exceed an equal value of surveyed grazing district land or of unreserved surveyed public land in the same State or within a distance of not more than fifty miles within the adjoining State nearest the base lands: Provided, That before any such exchange shall be effected, notice of the contemplated exchange, describing the lands involved, shall be published by the Secretary of the Interior once each week for four successive weeks in some newspaper of general circulation in the county or counties in which may be situated the lands to be accepted, and in the same manner in some like newspaper published in any county in which may be situated any lands to be given in such exchange; lands conveyed to the United States under this Act shall, upon acceptance of title, become public lands and parts of the grazing district within whose exterior boundaries they are located: Provided further, That either party to an exchange may make reservations of minerals, easements, or rights of use, the values of which shall be duly considered in determining the values of the exchanged lands. Where reservations are made in lands conveyed to the United States, the right to enjoy them shall be subject to such reasonable conditions respecting ingress and egress and the use of the surface of the land as may be deemed necessary by the Secretary of the Interior. Where mineral reservations

are made in lands conveyed by the United States, it shall be so stipulated in the patent, and any person who acquires the right to mine and remove the reserved mineral deposits may enter and occupy so much of the surface as may be required for all purposes incident to the mining and removal of the minerals therefrom, and may mine and remove such minerals, upon payment to the owner of the surface for damages caused to the land and improvements thereon. Upon application of any State to exchange lands within or without the boundary of a grazing district the Secretary of the Interior is authorized and directed, in the manner provided for the exchange of privately owned lands in this section, to proceed with such exchange at the earliest practicable date and to cooperate fully with the State to that end, but no State shall be permitted to select lieu lands in another State.

SEC. 9. The Secretary of the Interior shall provide, by suitable rules and regulations, for cooperation with local associations of stockmen, State land officials, and official State agencies engaged in conservation or propagation of wild life interested in the use of the grazing districts. The Secretary of the Interior shall provide by appropriate rules and regulations for local hearings on appeals from the decisions of the administrative officer in charge in a manner similar to the procedure in the land department. The Secretary of the Interior shall also be empowered to accept contributions toward the administration, protection, and improvement of the district, moneys so received to be covered into the Treasury as a special fund, which is hereby appropriated and made available until expended, as the Secretary of the Interior may direct, for payment of expenses incident to said administration, protection, and improvement, and for refunds to depositors of amounts contributed by them in excess of their share of the cost.

SEC. 10. That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received from each grazing district during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received from each grazing district during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said grazing district is situated, to be expended as the State legislature may prescribe for the benefit of the county or counties in which the grazing district is situated: Provided, That if any grazing district is in more than one State

or county, the distributive share to each from the proceeds of said district shall be proportional to its area therein.

SEC. 11. That when appropriated by Congress, 25 per centum of all moneys received from each grazing district on Indian lands ceded to the United States for disposition under the public-land laws during any fiscal year is hereby made available for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements; and an additional 25 per centum of the money received from grazing during each fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which said lands are situated, to be expended as the State legislature may prescribe for the benefit of public schools and public roads of the county or counties in which such grazing lands are situated. And the remaining 50 per centum of all money received from such grazing lands shall be deposited to the credit of the Indians pending final disposition under applicable laws, treaties, or agreements. The applicable public land laws as to said Indian ceded lands within a district created under this Act shall continue in operation, except that each and every application for nonmineral title to said lands in a district created under this Act shall be allowed only if in the opinion of the Secretary of the Interior the land is of the character suited to disposal through the Act under which application is made and such entry and disposal will not affect adversely the best public interest, but no settlement or occupation of such lands shall be permitted until ninety days after allowance of an application.

SEC. 12. That the Secretary of the Interior is hereby authorized to cooperate with any department of the Government in carrying out the purposes of this Act, and in the coordination of range administration, particularly where the same stock grazes part time in a grazing district and part time in a national forest or other reservation.

SEC. 13. That the President of the United States is authorized to reserve by proclamation and place under national-forest administration in any State where national forests may be created or enlarged by Executive order any unappropriated public lands lying within watersheds forming a part of the national forests which, in his opinion, can best be administered in connection with existing national-forest administration units, and to place under the Interior Department administration any lands within national forests, principally valuable for grazing, which, in his opinion, can best be administered under the provisions of this Act: Provided, That such reservations or transfers shall not interfere with legal rights acquired under any public-land laws so long as such rights are legally maintained. Lands placed under

the national-forest administration under the authority of this Act shall be subject to all the laws and regulations relating to national forests, and lands placed under the Interior Department administration shall be subject to all public-land laws and regulations applicable to grazing districts created under authority of this Act. Nothing in this section shall be construed so as to limit the powers of the President (relating to reorganizations in the executive departments) granted by title 4 of the Act entitled "An Act making appropriations for the Treasury and Post Office Departments for the fiscal year ending June 30, 1934, and for other purposes," approved March 3, 1933.

SEC. 14. That section 2455 of the Revised Statutes, as amended, is amended to read as follows:

"SEC. 2455. Notwithstanding the provisions of section 2357 of the Revised Statutes (U. S. C., title 43, sec. 678) and of the Act of August 30, 1890 (26 Stat. 391), it shall be lawful for the Secretary of the Interior to order into market and sell at public auction, at the land office of the district in which the land is situated, for not less than the appraised value, any isolated or disconnected tract or parcel of the public domain not exceeding seven hundred and sixty acres which, in his judgment, it would be proper to expose for sale after at least thirty days' notice by the land office of the district in which such land may be situated: Provided, That for a period of not less than thirty days after the highest bid has been received, any owner or owners of contiguous land shall have a preference right to buy the offered lands at such highest bid price, and where two or more persons apply to exercise such preference right the Secretary of the Interior is authorized to make an equitable division of the land among such applicants, but in no case shall the adjacent land owner or owners be required to pay more than three times the appraised price: Provided further, That any legal subdivisions of the public land, not exceeding one hundred and sixty acres, the greater part of which is mountainous or too rough for cultivation, may, in the discretion of the said secretary, be ordered into the market and sold pursuant to this section upon the application of any person who owns land or holds a valid entry of lands adjoining such tract, regardless of the fact that such tract may not be isolated or disconnected within the meaning of this section: Provided further, That this section shall not defeat any valid right which has already attached under any pending entry or location. The word 'person' in this section shall be deemed to include corporations, partnerships, and associations."

SEC. 15. The Secretary of the Interior is further authorized in his discretion, where vacant, unappropriated, and unreserved lands of the public domain are situated in such isolated or dis-

connected tracts of six hundred and forty acres or more as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands to owners of lands contiguous thereto for grazing purposes, upon application therefor by any such owner, and upon such terms and conditions as the Secretary may prescribe.

SEC. 16. Nothing in this Act shall be construed as restricting the respective States from enforcing any and all statutes enacted for police regulation, nor shall the police power of the respective States be, by this Act, impaired or restricted, and all laws heretofore enacted by the respective States or any thereof, or that may hereafter be enacted as regards public health or public welfare, shall at all times be in full force and effect: Provided, however, That nothing in this section shall be construed as limiting or restricting the power and authority of the United States.

Approved, June 28, 1934.

26 *Exhibit B to complaint*

113954

OFFICE OF THE SECRETARY, DIVISION OF GRAZING
WASHINGTON

RULES FOR ADMINISTRATION OF GRAZING DISTRICTS

(Under the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act)

Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.

During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Licenses

Licenses issued in 1936 will be operative only during that year or for such part of 1937 as may be considered the "winter grazing season" as determined by local usage, but in no event will extend beyond May 1, 1937.

Such licenses will be revocable for violation of the terms thereof and will terminate on the issuance of permits in a district.

An applicant for a grazing license is qualified if he owns livestock and is:

1. A citizen of the United States of America or one who has filed his declaration of intention to become such, or

2. A group, association or corporation authorized to conduct business under the laws of the State in which the grazing district is located.

The following definitions will be used in issuing licenses only:

Property shall consist of land and its products or stock water owned or controlled and used according to local custom in livestock operations. Such property is:

(a) "Dependent" if public range is required to maintain its proper use.

(b) "Near" if it is close enough to be used in connection with public range in usual and customary livestock operations.
27 In case the public range is inadequate for all the near properties, then those which are nearest in distance and accessibility to the public range shall be given preference over those not so near.

(c) "Commensurate" for a license for a certain number of livestock if such property provides proper protection according to local custom for said livestock during the period for which the public range is inadequate.

Priority of use.—Is such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper use of both the public range and the lands or water used in connection therewith.

Issuance of Licenses

After residents within or immediately adjacent to a grazing district having dependent commensurate property are provided with range for not to exceed ten (10) head of work or milch stock kept for domestic purposes, the following named classes, in the order name, will be considered for licenses:

1. Qualified applicants with dependent commensurate property with priority of use.

2. Qualified applicants with dependent commensurate property but without priority of use.

3. Qualified applicants who have priority of use but not commensurate property.

4. Other qualified applicants.

Licenses will be issued in the above-named order of classes until the carrying capacity of the public range shall be attained. If a class more than exhausts the capacity of the range, all junior classes will be eliminated, and cuts within the last-recognized class shall be made by reduction of numbers or limitation of seasonal use until the number equal to the fixed carrying capacity of the public range is reached.

Fees

A grazing fee of five (5) cents per head per month or fraction thereof, for each head of cattle or horses and one (1) cent per month, or fraction thereof, for each sheep or goat shall be collected from each licensee except free-use licenses.

Elections of District Advisors (Omitted)
District Advisors (Omitted)
Hearings and Appeals (Omitted)

General Rules of the Range

The following rules shall supersede all previous rules heretofore promulgated for grazing districts created under the act of June 28, 1934 (48 Stat. 1269), and shall be operative in all grazing districts in the States of Arizona, California, Colorado, Idaho, Oregon, Montana, Nevada, New Mexico, Utah, and Wyoming.

28 The following acts are prohibited on the lands of the United States in said grazing districts under the jurisdiction of the Division of Grazing of the Department of the Interior.

1. The grazing upon or driving across any public lands within said grazing districts of any livestock without a license.
2. Grazing upon or driving across said grazing district lands of any livestock in violation of the terms of a license.
3. Allowing stock to drift and graze on said district lands without a license.
4. Constructing or maintaining any kind of works, structure, fence, or enclosure without authority of law or license.
5. Destroying, molesting, disturbing, or injuring property used, or acquired for use, by the United States in the administration of grazing districts.

The following rules for fair range practice will be complied with by all licensees within said grazing districts:

1. All licensees will comply with the laws of the State within which the grazing district is located in regard to the number and kind of bulls turned on the range.
2. Crossing licensees shall follow the route prescribed in the crossing license, at a rate of not less than five (5) miles per day for sheep or goats and ten (10) miles per day for cattle and horses.

Procedure for Enforcement of Penalties for Violation of the Rules and Regulations

Section 2 of the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act, provides that "any wilful

violation of the provisions of this act" or of "rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

The proceedings to prevent trespass and unlawful occupancy and use of the public domain range in violation of the act of June 28, 1934 (48 Stat. 1269), and to enforce the regulation thereunder shall be as follows:

1. The regional grazier shall serve the alleged violator with notice in writing in which reference shall be made to the applicable section of the law or of the regulation alleged to have been violated and reference shall also be made to the acts constituting such alleged violation. Such notice may be served in person or by registered mail, and the affidavit of the person making personal service of the registry receipt shall be preserved. When the alleged violator is charged with unlawfully grazing livestock on the public domain range, said notice will require him to remove said livestock forthwith or within such reasonable time as may be fixed by the regional grazier and specified in said notice.

2. If the owner of the livestock is found upon the public
29 range in violation of the law or of the regulations of the terms of his license and upon whom notice is served as aforesaid fails to remove his livestock within the time specified in said notice, the regional grazier shall forthwith issue an order in writing directed to any grazier, or any other person to be designated by the regional grazier, authorizing and commanding the person to whom the notice is directed to remove said livestock.

3. All violations of the law or any rule or regulation, or of the terms of a license, and any acts done in violation of the act of June 28, 1934 (48 Stat. 1269), or rules or regulations thereunder, shall be immediately reported to the Divisions of Investigations.

Local Associations of Stockmen

Organization.—Qualified applicants in a grazing district may organize a local association, or several associations, according to the classes of livestock, or by community of interest or otherwise.

Articles of Incorporation, Constitutions and By-Laws.—Such associations shall be organized as corporations "not-for-profit," if permissible under the laws of the State in which the grazing district, or the greater part thereof, is situate; otherwise, said

associations may be organized as cooperative, unincorporated associations. In either case the articles of incorporation, the charters, or the constitutions of such associations, together with the by-laws, shall be submitted to the Secretary of the Interior before the organization of the association shall be recognized by the Department of the Interior.

Powers.—Said local associations should be authorized to exercise the following powers:

1. To lease, or otherwise acquire, State, County, privately owned, tax-default, or other lands within or near a district.

2. To make contributions in cash, property, material or labor, toward the administration, protection, and improvement of the district.

3. To construct and maintain fences, wells, reservoirs, and other improvements necessary to the care and management of the livestock grazed in said district, if and when authorized by the Secretary of the Interior.

4. To act in an advisory capacity to the Secretary of the Interior in the administration of grazing privileges on said lands. All recommendations of said association acting in the capacity authorized by this subdivision shall be subject to the rules and regulations for grazing district generally, and shall include the right of a hearing and appeal.

5. To recommend the amount, manner of apportionment, time and method of collection of assessments for strictly association purposes, as well as for the public purposes contemplated by the act of June 28, 1934 (48 Stat. 1269).

6. To make and enter into cooperative agreements with the Secretary of the Interior for any of the said purposes any any other purpose authorized by said Act.

The foregoing rules for administration of grazing districts shall be effective immediately as to all grazing districts now established and to all new grazing districts when established and they supersede Division of Grazing Circulars Nos. 1, 2, 4, and 6 heretofore issued.

F. R. CARPENTER,
Director of Grazing.

Approved March 2, 1936.
HAROLD L. ICKES,
Secretary of the Interior.

31 *Exhibit C to complaint*

018986 N #1.

UNITED STATES DEPARTMENT OF THE INTERIOR,
DIVISION OF GRAZING, BOX 429,
Reno, Nevada, May 25, 1936.

NOTICE

To all those who have been recommended for a 1936 license to graze livestock on the public domain in region 3, comprising: California grazing districts one and two, Nevada grazing districts one and two, and Oregon grazing district one.

Several weeks ago your local U. S. Land Office located in Sacramento for California districts, Carson City for Nevada districts and in Lakeview for Oregon District No. 1, mailed you notices of the amount of fees now due and payable to the U. S. Land Office before grazing license is issued.

If your license is for a three months period of use, or less, the full amount of the fee is payable in advance, but if it is for a period of over three months, you may pay in at lease two instalments each in advance, as outlined, in the notice mailed you by the U. S. Land Office. Should you have stock on the public domain and have not paid the first instalment of the fee and received your license you are technically in trespass. If there is some slight adjustment which you think should be made in your fee or your license, make the first payment in accordance with Land Office instructions, then ask for consideration of the adjustment. After investigation if it is determined that you have been overcharged, you will be given credit for the amount of the overcharge on your second payment, or if you have paid in full, the Land Office will send you a blank to fill out requesting a refund of the amount overpaid.

Your cooperation in this matter of payment of fees and obtaining your grazing licenses is earnestly requested.

In order, therefore, that no undue hardships may be worked upon anyone, you will be given until June 15, 1936, in which to pay your fees to your local Land Office and obtain your licenses. Users of the public domain in any of the above districts who have not obtained their licenses by June 15, 1936, will be considered in trespass which, under the Act of June 28, 1934 (48 Stat. 1269), is punishable by fine of not more than $500.

Please disregard this notice if your fees have been paid and license issued.

L. R. BROOKS,
Acting Regional Grazier.

32 *Exhibit D to complaint*

Name	First installment	Second installment	Total
Archie J. Dewar	$95.38	$95.38	$190.76
Eureka Land & Stock Co	135.00	135.00	270.00
Jose Sustacha	68.13	68.13	136.26
Paul Guidici	18.00	18.00	36.00
R. W. Anderson	75.75		75.75
J. F. McKnight	3.50	3.50	7.00
Thomas W. McKnight	7.50	7.50	15.00
Harry E. Webb	7.88		7.88
George M. Glaser	2.50		2.50
P. J. Wollman	38.50	38.50	77.00
Ruth DeRemer	4.55	4.55	9.10
S. T. Wines	105.00	70.00	175.00
Alfred W. Smith	106.50	106.50	213.00
C. H. Rand	108.50	108.50	217.00
Arrascada Bros	111.00	111.00	222.00
J. M. Prunty	52.50	52.50	105.00
Seventy-One Ranch	1,330.00	1,330.00	2,660.00
Frank Yates	15.75	15.75	31.50
Emery C. Smith	175.00	175.00	350.00
D. F. & Clarence Glaser	210.70	210.70	421.40
D. M. McCuistion	31.50	31.50	63.00
Balbino Achabal	109.75	109.75	219.50
Ed. E. Oldham, Sr	5.50	5.50	11.00
Warm Creek Land & Livestock Co	Paid	87.50	87.50
H. Moffat Company	975.00	975.00	1,950.00
Utah Construction Co	Paid	2,625.00	2,625.00
George Hennen	78.75	78.75	157.50
Jos. Lynn	26.00	26.00	52.00
33 Fred Fernald	25.38	25.38	50.76
H. A. Agee	52.50	52.50	105.00
George M. Glaser	11.00	11.00	22.00
W. H. Blair	43.75	43.75	87.50
K. L. Reed	22.50	22.50	45.00
(Mrs. Lettie Filler & Mrs. Lizzie Whitney)	5.00	5.00	10.00
Earl Q. Prunty	42.38	42.38	84.76
Albert W. Goble, Jr.	15.00	15.00	30.00
C. N. Clayson #2	13.25	13.25	26.50
Ellen Griffin	73.87	73.87	147.74
J. R. & Edgar Plummer	21.99	21.99	43.98
Roche Brothers	12.50	12.50	25.00
Horace C. Shiveley	17.10	17.10	34.20
Cummins Bros	37.63	37.63	75.26
George A. Terry	7.19	7.19	14.38
W. R. Rand	128.30	128.30	256.60
Hibernia Savings & Loan Society	Paid	262.50	262.50
S. C. Weeks and S. J. Weeks	Paid	630.00	630.00
A. G. McBride	Paid	73.50	73.50
Barney Monasterio	41.26	41.26	82.52
Garat & Co	421.82	421.82	843.64
Total	4,890.56	8,447.93	13,338.49

34 In District Court of Washoe County

[Title omitted.]

[File endorsement omitted.]

Summons

Filed June 16, 1936

35 The STATE OF NEVADA SENDS GREETINGS TO SAID DEFENDANT:

You are hereby summoned to appear within ten days after the service upon you of this summons if served in said County, or within twenty days if served out of said County but

within said Judicial District, and in all other cases, within thirty days—exclusive of the day of service—and defend the above entitled action.

[SEAL]

E. H. BEEMER
E. H. Beemer,
Clerk of said Court.
By ——— ———,
Deputy Clerk.

Dated June 16, 1936.

MILTON B. BADT,
Elko, Nevada,
Attorney for the Plaintiffs.

DONOVAN, LEISURE, NEWTON & LUMBARD,
WILLIAM J. DONOVAN,
CARL E. NEWTON,
HIRAM E. WOOSTER,
JOHN HOWLEY,
2 Wall Street, New York City, New York,
Of Counsel.

36 *Return*

SHERIFF'S OFFICE,
County of Washoe, State of Nevada, ss.

I hereby certify and return that I received the within Summons on the 16th day of June A. D. 1936 and that I personally served the same upon the within named defendant L. R. Brooks by showing the original Summons to him and delivering to him a copy of the same, in Washoe County, State of Nevada, on the 17th day of June A. D. 1936, and I further return that I delivered to the said L. R. Brooks a certified copy of the complaint in said within entitled action, with a copy of the Summons attached, at the same time and place.

Dated this 17th day of June A. D. 1936.

RAY J. ROOT,
Sheriff of Washoe County, State of Nevada.
By GEO W. LOTHROP,
Deputy.

37 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Demurrer

Filed Oct. 24, 1936

38 Comes now the defendant, and demurs to the complaint of plaintiffs filed herein, and for grounds of demurrer alleges:

I

That the complaint does not state facts sufficient to constitute a cause of action against the defendant.

II

That there is a defect of parties defendant, in that it affirmatively appears upon the face of the complaint that plaintiffs seek to control the actions of the Secretary of the Interior of the United States by injunction; that said Secretary of the Interior has not been joined as a party defendant herein, and is an indispensable party defendant to this action; that said Secretary of the Interior has not voluntarily or otherwise appeared in this action.

III

That there is a defect of parties defendant, in that the bill of complaint affirmatively shows on its face that property rights of the United States of America are involved, and that the said United States of America is an indispensable party defendant in this action.

IV

That the court has no jurisdiction of the person of the defendant, or the subject matter of the action, as the suit is in essence one against the United States of America which has not given its consent to be sued; that property rights of the United States are involved, and the subject matter of the complaint is exclusively within the political division of the Government of the United States, and is not the subject of review by courts.

38a V

That several causes of action have been improperly united, as shown by the face of the complaint.

Wherefore defendant prays that plaintiffs take nothing by their action and that the same be dismissed with costs to defendant.

E. P. CARVILLE,
E. P. Carville,
United States Attorney,
Attorney for Defendant.

39 In District Court of Washoe County

No. 53160

ARCHIE J. DEWAR ET AL.

vs.

L. R. BROOKS

Order overruling demurrer

Dec. 27, 1938

The Court at this time rendered its decision, and ordered that the defendant's Demurrer to the Plaintiffs' Complaint heretofore argued and submitted, be overruled, and the defendant may have up to and including the 20th day of January 1939 in which to answer.

* * * * *

Whereupon, a recess was taken until the further order of the Court.

A. J. MAESTRETTI,
District Judge.

40 [File endorsement omitted.]

In District Court of the Second Judicial District of Nevada, in and for the County of Washoe

ARCHIE J. DEWAR, EUREKA LAND & STOCK CO., ET AL., PLAINTIFFS

vs.

L. R. BROOKS, DEFENDANT

41 *Judgment by default*

Filed April 20, 1939

Plaintiffs having filed herein their complaint for injunction on the 16th day of June 1936, and summons having issued on said date and the Court having on said date made and filed its restraining order and order to show cause restraining the defendant herein, his deputies, agents, and all persons acting in privity with him, from barring, or threatening to bar, the plaintiffs or any of them, from grazing their livestock upon the public range within Nevada Grazing District No. 1, and/or prosecuting the said plaintiffs, or any or either of them, under the penal provisions of the act of June 28, 1934, mentioned in

said complaint and commonly known as the Taylor Grazing Act, and/or from commencing any civil action or actions against the plaintiffs, or any of them, for trespass or otherwise under the provisions of said act, for the time and under the conditions more specifically set forth in such restraining order and order to show cause, and providing further that as bond for the issuance of said restraining order the said plaintiffs deposit with the Clerk of this Court the respective amounts then claimed to be due and payable from them to the Department of the Interior for license fees, all of which said sums and amounts were in said order specifically set forth, and which said sums were deposited by plaintiffs with the Clerk as required;

And an order having been made and filed by the above entitled court on the 26th day of June 1936, on petition, notice and bond of the defendant, removing said cause to the District Court of the United States for the District of Nevada;

And the said cause having been thereafter by said United States District Court for the District of Nevada, on motion of the plaintiffs herein, remanded to this Court for further proceedings (16 Fed. Supp. 636);

42 And it appearing that thereafter the plaintiffs in this action were temporarily restrained from further prosecuting the same by an order of the District Court of the United States for the District of Nevada in an action in which the United States of America was plaintiff and plaintiffs herein were defendants, and that thereafter the said last mentioned action was, on motion of the defendants therein, being the plaintiffs herein, dismissed (18 Fed. Supp. 981);

And defendant herein having thereafter appeared in said action in response to the said complaint and summons and order to show cause and served and filed his demurrer to the complaint of plaintiffs herein, and said demurrer having been argued and submitted to the above-entitled Court, Hon. A. J. Maestretti presiding, and said Court having thereafter and on the 28th day of December 1938, made and filed its order herein overruling the said demurrer of defendant to the said complaint of plaintiffs and granting to the said defendant to and including the 20th day of January 1939, within which to answer said complaint; and said Court having thereafter on the 6th day of January 1939, on motion of defendant, made and filed its order herein further extending the defendant's time to answer to February 20, 1939; and said Court having thereafter on February 16, 1939, on motion of defendant, made and filed its order further extending defendant's time to answer to and including the 13th day of March 1939;

And it appearing that in the said proceedings the said plaintiffs were represented by Milton B. Badt, Esq. (Messrs. Donovan, Leisure, Newton & Lumbard, William J. Donovan, Esq., Carl A. Newton, Esq., Hiram E. Wooster, Esq., and John Howley, Esq., of Counsel) and that the said defendant was represented by E. P. Carville, Esq., United States Attorney, and Miles N. Pike, Esq., and Thomas O. Craven, Esq., Assistant United States Attorneys, and thereafter, upon the expira-
43 tion of the term of office of the said E. P. Carville, Esq., by William S. Boyle, Esq., United States Attorney, and John S. Halley, Esq., and Thomas O. Craven, Esq., Assistant United States Attorneys;

And it appearing that thereafter and on the 16th day of March 1939, the said defendant L. R. Brooks, by his Attorney, William S. Boyle, Esq., United States Attorney, in writing, elected to stand upon the said demurrer and not to answer the said complaint but to allow judgment by default to be entered against the said defendant; and it appearing that the said defendant has failed to answer the complaint of plaintiff herein or otherwise further appear or plead in said action within the time provided by law, rule of court, or order of the above entitled Court, or at all;

And it appearing that by reason of the said default of said defendant the allegations of said complaint are taken as confessed and true and that the said defendant has waived findings of fact and conclusions of law;

Now, therefore, on motion of Milton B. Badt, Esq., attorney for plaintiffs, and the Court being fully advised in the premises,

It is hereby ordered, adjudged, and decreed:

1. That the default of the defendant be, and the same hereby is, entered by reason of his failure to answer within the time provided by law and the order of this Court after the overruling of his demurrer to the complaint of plaintiffs herein, and the Clerk of said Court is hereby directed to enter such default.

2. That by reason of said default each and all of the allegations of the complaint of plaintiffs are taken as confessed and true.

3. That by reason of the premises the plaintiffs are entitled to judgment against said defendant as prayed for in their said complaint.

44 4. That the Director of Grazing and the Secretary of the Interior had no authority, power, or jurisdiction to promulgate, or to order or approve promulgation of, the rules of March 2, 1936, more particularly described in the complaint herein, requiring plaintiffs to pay the fees as set forth in said complaint and in said rules as a prerequisite to grazing their

livestock upon the public range within Nevada Grazing District No. 1 under the temporary revocable licenses described in said complaint.

5. That the defendant herein be, and he hereby is perpetually enjoined from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 in default of payment of the grazing fee of five cents per month or fraction thereof per head of cattle, and one cent per month or fraction thereof per head of sheep, grazed upon such public range and in default of obtaining a new temporary license as rquired by said rules of March 2, 1936.

6. That the said rules and regulations in this Order, Judgment, and Decree referred to are as set forth in Exhibit A hereunto annexed and made a part hereof for purposes of reference.

7. That bond for temporary restraining order posted by the plaintiffs herein be, and the same hereby is, exonerated, to-wit, that the sundry sums of money deposited with the Clerk of this Court by the sundry plaintiffs herein as bond for the issuance of the said restraining order herein be returned by said Clerk to the said plaintiffs through their said attorney, and that the said Clerk be, and he hereby is, authorized and directed to return the said moneys, deposited as bond as aforesaid, to Milton B. Badt, Esq., Attorney of record for the plaintiffs herein and to accept and file in the files of said Clerk in said cause the receipt of said attorney for said moneys.

Dated this 20th day of April 1939.

(S) WM. MCKNIGHT,
Judge of said District Court presiding.

45 [Exhibit A omitted. See exhibit B—Printed side page. 26 ante.]

50 [Clerk's certificate to foregoing transcript omitted in printing.]

51 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Notice of appeal

Filed June 23, 1939

52 *To the Honorable William McKnight, Judge of said District Court, to the Plaintiffs in the Above-Entitled Action, and to Milton B. Badt, Esquire, Their Attorney, and to William J. Donovan, Carl E. Newton, Hiram E. Wooster, and John Howley, of Counsel for the Plaintiffs:*

You and each of you will please take notice that L. R. Brooks, the defendant in the above-entitled action, hereby appeals to the Supreme Court of the State of Nevada from the judgment in said action rendered in favor of the plaintiffs above-named, and against the defendant, L. R. Brooks, and entered on the 20th day of April 1939 in the records of the Second Judicial District Court of the State of Nevada, in and for the County of Washoe, and from the whole of said judgment.

Dated this 23rd day of June 1939.

WILLIAM S. BOYLE,
United States Attorney,
JOHN S. HALLEY,
Ass't. United States Attorney.
THOMAS O. CRAVEN,
Ass't. United States Attorney,
Attorneys for Defendant.

53 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Undertaking on appeal

Filed June 23, 1939

54 Whereas, L. R. Brooks, the defendant in the above-entitled action, is about to appeal to the Supreme Court of the State of Nevada, from a judgment rendered against him in said action in the said District Court, and in favor of the Plaintiffs, and entered on the 20th day of April 1939:

Now, therefore, in consideration of the premises and of such appeal, we, the undersigned, L. R. Brooks as principal, and the American Surety Company of New York, a corporation organized and existing under the laws of the State of New York, and qualified to do business in the State of Nevada as surety, do hereby jointly and severally undertake and promise on the part of the appellant, the said L. R. Brooks, that he will pay all damages and costs which may be awarded against him on the appeal, or on dismissal thereof, not exceeding three hundred

($300.00) dollars, to which amount we acknowledge ourselves jointly and severally bound.

Dated this 23rd day of June 1939.

L. R. BROOKS,
Principal.
AMERICAN SURETY COMPANY OF NEW YORK,
By CLARENCE H. PATTEN,
Resident Vice President.
By ALBERT D. AYRES,
Resident Assistant Secretary.

55 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Notice of filing undertaking

Filed June 28, 1939

56 *To the Plaintiffs above-named; to William J. Donovan, Carl E. Newton, Hiram E. Wooster and John Howley, of Counsel for Plaintiffs, and to Milton B. Badt, Esquire, attorney for Plaintiffs:*

You and each of you will please take notice that L. R. Brooks, the defendant herein, did, on the 23rd day of June 1939, file his undertaking for costs on appeal in the above-entitled cause, with the Clerk of said Court.

WILLIAM S. BOYLE,
United States Attorney,
JOHN S. HALLEY,
Ass't United States Attorney,
THOS. O. CRAVEN,
Ass't United States Attorney,
Attorneys for defendant.

57 In District Court of Washoe County

[Title omitted.]
[File endorsement omitted.]

Affidavit of service

Filed June 30, 1939

58 STATE OF NEVADA,
County of Washoe, ss:

Juanita Kussell, being first duly sworn, deposes and says that she is a stenographer in the office of the United States Attorney for the District of Nevada, that on the 23rd day of June 1939 she placed in an envelope, upon which the postage had been fully prepaid, a duplicate copy of Notice of Appeal, Undertaking on Appeal, and Notice of Filing Undertaking in the above-entitled matter, which said envelope was addressed to Milton B. Badt, Esq., Elko, Nevada, one of the attorneys for the plaintiffs, and which said envelope, so addressed and containing said copy of Notice of Appeal, Undertaking on Appeal, and Notice of Filing Undertaking, she deposited in the United States Post Office at Reno, Washoe County, Nevada, on the said 23rd day of June 1939.

JUANITA KUSSELL.

Subscribed and sworn to before me this 23rd day of June 1939.

WILLIAM S. BOYLE,
Notary Public,
in and for the County of Washoe, State of Nevada.

59 [Clerk's certificate to foregoing transcript omitted in printing.]

61 [File endorsement omitted.]

In Supreme Court of Nevada

L. R. BROOKS, APPELLANT

vs.

ARCHIE J. DEWAR, EUREKA LAND & STOCK CO., ET AL., RESPONDENTS

62 *Notice and motion to remand record*

Filed September 23, 1939

To Plaintiffs and Respondents herein and to Milton B. Badt, Esq., Their Attorney, and to William J. Donovan, Carl E. Newton, Hiram E. Wooster and John Howley, of Counsel for said Plaintiffs and Respondents:

You and each of you will please take notice that L. R. Brooks, defendant and appellant herein, by his attorneys, Miles N. Pike, United States Attorney, Thomas O. Craven, Assistant United States Attorney, and John S. Halley, Assistant United States

Attorney, will, on Wednesday, October 18, 1939, at the hour of ten A. M. of that day, or as soon thereafter as counsel can be heard, at the court room of the Supreme Court of the State of Nevada, at Carson City, Nevada, move the above-entitled Court for an order remanding the transcript of record on appeal heretofore filed in said court in the above-entitled cause, to the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, for amendment and correction in the respects hereinafter indicated. Said motion will be made upon the following grounds: that there was erroneously omitted from said transcript of record on appeal, by the mistake, inadvertence and excusable neglect, of counsel for defendant and appellant, the following documents filed in the lower court upon the following dates:

(1) Notice of Appeal, filed June 23, 1939.

(2) Undertaking on Appeal, filed June 23, 1939.

That the following points, inter-alia, are involved in this said cause:

(1) Whether or not the trial court erred in overruling appellant's demurrer to plaintiff's complaint.

(2) Whether or not the trial court committed error in law.

(3) Whether or not the judgment of the trial court is against law.

63 That without said documents heretofore mentioned being included in said transcript of record on appeal, said transcript of record on appeal does not accurately or fully state the substance of the proceedings relating to the points involved in said cause, and without considering said documents, this Honorable Court cannot pass upon the point or points involved in said cause.

That appellant now seeks to have said omissions and inaccuracies corrected.

That upon said hearing appellant will refer to and use the affidavit of John S. Halley, a copy of which is attached hereto and the testimony of John S. Halley, and all records, papers, and files in this cause in the office of the Clerk of the Supreme Court, and in the files in the office of the Clerk of the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe.

MILES N. PIKE,
United States Attorney.
One of the Attorneys for Defendant and Appellant.

64 In Supreme Court of Nevada

[Title omitted.]

Affidavit in support of motion for an order correcting and amending bill of exceptions and record on appeal

STATE OF NEVADA,
County of Washoe, ss:

John S. Halley, being first duly sworn, according to law, deposes and says that he is now and continuously at all times since August 22, 1938, has been an Assistant United States Attorney for the District of Nevada, and has, during all of said time, been one of the counsel for L. R. Brooks, defendant and appellant in the above-entitled cause; That affiant is and was, one of counsel who presented the said cause on behalf of defendant in the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, and is particularly familiar with all proceedings had relating to the said cause in the said Second Judicial District Court.

That he is particularly familiar with the transcript of record on appeal and the proceedings had on appeal in the said cause; that said transcript of record on appeal was filed with the Clerk of the Supreme Court of the State of Nevada on July 21,
65 1939, and that a copy of the same was mailed to Milton B. Badt, Esq., Elko, Nevada, of counsel for plaintiffs and respondents on or about July 27, 1939.

That as a result of the mistake, inadvertence and excusable neglect of this affiant, the following papers, records, and documents, to wit: Original Notice of Appeal, and the original Undertaking on Appeal, both filed with the Clerk of the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe on June 23, 1939, were omitted from the said transcript of record on appeal; that affiant personally supervised the preparation of said record on appeal; that at the time of the making and preparation of the said record on appeal, the said Notice of Appeal and the said Undertaking on Appeal were, and each of them was, then on file and a part of the record of this cause in the District Court of the second Judicial District of the State of Nevada, in and for the County of Washoe; that the said records and documents are an essential and indispensable part of the said record on appeal, to the end that the said cause may be tried upon its merits; that full, true, and correct copies of each of said records and documents are attached to and made part of this Affidavit and are certified as correct copies by this affiant; that the annexed copy of the Notice

of Appeal is marked "Exhibit A" and the annexed copy of the Undertaking on Appeal is marked "Exhibit B"; that the originals of each of two said documents are now remaining on file with the Clerk of the District Court of the Second Judicial District of the State of Nevada, in and for the county of Washoe.

That final judgment of the Supreme Court of the State of Nevada has not been made in this cause; that appellant's
66 Opening Brief was filed herein on September 6, 1939, and that on September 11, 1939, the written admission of service of copies of said brief, signed by Milton B. Badt, Esq., of counsel for plaintiffs and respondents, showing such service as of September 9th, 1939, was filed with the Clerk of this Court; that by letter to the United States Attorney at Reno, Nevada, dated September 13, 1939, the said Milton B. Badt, Esq., requested a written stipulation extending the time for the filing of respondent's Answering Brief herein, to and including October 24, 1939, which said Stipulation was signed by said United States Attorney, of Counsel for appellants, and which said stipulation was filed by the Clerk of this Court at the request of said Milton B. Badt, Esq., of counsel for respondents, and order of Court was entered thereon so extending the time for the filing of respondent's Answering Brief, on September 20, 1939; that without the aforementioned papers and records, the record on appeal will not accurately and fully state the proceedings under consideration before the Court; that with the aforementioned records and documents embodied in the record on appeal, the same will accurately and fully state the proceedings under consideration by the Court; that the following points inter-alia are involved in the proceedings:

(1) Whether or not the trial court erred in overruling appellant's demurrer to plaintiff's complaint.

(2) Whether or not the trial Court committed error in law.

(3) Whether or not the judgment of the trial Court is against law.

67 That this is a meritorious appeal; that without the said documents being included, said record on appeal does not accurately or fully state the substance of the proceedings relating to the points involved in said cause; that without considering said documents, the Supreme Court cannot pass upon the point or points involved in said cause; that the allowance of said Court of said amendment will be in the furtherance of justice in that it will make said records speak the truth and that it will enable said appellant to obtain a review of said cause by the Supreme Court upon its merits; that without said correction and amendment, appellant's appeal will be futile and of no substantial avail; that no prejudice will result to plaintiffs and respondents

by the allowance thereof, and that they will not in anywise be adversely affected thereby; that the allowance will enable the Supreme Court to hear, try, and determine the whole case upon its merits.

That said transcript of record on appeal, in its present form, was served upon Milton B. Badt, Esq., of counsel for plaintiffs and respondents, copy of which was mailed to him at Elko, Nevada, on July 27, 1939, by appellant's counsel at Reno, Nevada; that no amendment thereto was proposed by respondents, or defects suggested; that by the mistake, inadvertence, and excusable neglect of appellant's counsel, the said documents were not included in the said transcript of record on appeal, and said mistake was not discovered by petitioner's counsel until after the regular time for including said documents as a matter of right had expired.

Wherefore, affiant prays that the Court make such pro-
68 posed order or orders as may be necessary to the end that the said papers and documents may be, and become, a part of the record on appeal in the above entitled Court and cause.

JOHN S. HALLEY.

Subscribed and sworn to before me this 22nd day of September, 1939.

[SEAL]

CLEMENTINE WESTOVER,
Notary Public in and for the
County of Washoe, State of Nevada.

69 [Exhibit A omitted. Printed side page. 51 ante.]

71 [Exhibit B omitted. Printed side page. 53 ante.]

[File endorsement omitted.]

73 In Supreme Court of Nevada

No. 3287

L. R. BROOKS, APPELLANT

vs.

ARCHIE J. DEWAR, EUREKA LAND & STOCK CO., ET AL., RESPONDENTS

74 *Opinion*

Filed Oct. 24, 1940

By the Court, TABER, C. J.:

The Act of Congress commonly known as The Taylor Grazing Act was approved June 28, 1934. (C. 865, 48 Stat. 1269.) It

is entitled, "An Act to stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, to stabilize the livestock industry dependent upon the public range, and for other purposes." As amended and added to, the Act will be found in U. S. C. A., Title 43, c. 8A, §§ 315–315p (1939 Pocket Part), and in 9A, F. C. A., Title 43, §§ 315–315o (and 1940 Pocket Part, pp. 66–67).

The first sentence of section 1 provides, in part: "That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of eighty million (amended June 26, 1936, to read "one hundred forty-two million") acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, * * * and which in his opinion are chiefly valuable for grazing and raising forage crops * * *."

Section 2 reads: "The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

75

Section 3: "That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: Provided, That grazing permits shall be

issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied,
76 or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler, whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: Provided further, That nothing in this chapter shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validity affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this chapter, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this chapter shall not create
77 any right, title, interest, or estate in or to the lands."

By Executive Order of the President, November 26, 1934, the public lands of Nevada were withdrawn from settlement, location, sale, or entry, and reserved for classification pending the determination of the most useful purpose of such lands under said Act. Thereafter grazing districts were established in many

western states, including Nevada. Nevada Grazing District No. 1, embracing Elko county and that portion of Eureka and Lander counties north of the Humboldt River, was established April 8, 1935, by order of the Secretary of the Interior. Respondents, plaintiffs in the court below, are graziers in this district.

On May 31st, 1935, the Director of Grazing, acting under said § 2, promulgated certain rules requiring all persons grazing their livestock within grazing districts to obtain temporary licenses. These rules did not require payment of any license fees, and there were no fees for the year 1935. Under said rules, plaintiffs applied for and obtained temporary licenses, and these licenses were thereafter extended.

Upon call of the Secretary of the Interior, a conference of delegates from each of the grazing districts theretofore established was held at Salt Lake City January 13 and 14, 1936. The Director of Grazing asked the assembled delegates to advise him whether fees should be charged for new temporary licenses, and if so, what the amount of the fees should be. The Director suggested a uniform fee of five cents per month for each head of cattle and one cent per month for each sheep. Many delegates, and especially those from Nevada Grazing District No. 1, objected to the imposition of such fees, upon three grounds:
78 (1) that the Grazing Act did not authorize the Secretary to charge any fees whatsoever for temporary licenses; (2) that, as the conditions of various portions of the public range differed greatly from one another, all stockmen should not be charged the same uniform fees regardless of the public range where they grazed their livestock; and (3) that, for certain portions of the public range, especially those situated in Nevada Grazing District No. 1, such fees would be utterly unreasonable because, under conditions then existing, the privilege of grazing livestock on such portions of the public range was not worth the payment of such fees, and because the payment thereof would not permit stockmen situated like the plaintiffs to sell their livestock at a profit or to meet competitive conditions, or to obtain the credit necessary to operate their businesses. The Director of Grazing, however, found that a majority of the delegates were in favor of charging such fees. Plaintiffs' complaint alleges that the Director did not attempt to determine the reasonableness or unreasonableness of such fees as applied to particular portions of the public range.

The Director of Grazing, on March 2d, 1936, promulgated "Rules for Administration of Grazing Districts," which will herein be sometimes referred to as the Rules of March 2d, 1936. Among other things, these rules provided: (a) That the Division of Grazing of the Department of the Interior should issue to cer-

tain qualified applicants new temporary licenses to graze livestock upon the public range within the grazing districts theretofore established until the end of the "winter grazing season" of 1936–1937 or until May 1, 1937, or until the issuance of
79 "permits" within the meaning of Section 3 of said Act of June 28, 1934, whichever should be sooner; (b) That a fee of five cents per month or fraction thereof for each head of cattle, and a fee of one cent per month for each head of sheep, should be collected from each licensee grazing his livestock on the public range within a grazing district; and (c) That, after the issuance of said new temporary licenses, all stockmen should be prohibited from grazing livestock upon or driving them across the public range within a grazing district without such a license.

The first two paragraphs of the Rules of March 2, 1936, read as follows:

"Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.

"During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts."

Owing, as plaintiffs allege, to the necessity of protecting their livestock from injury, they applied for new temporary licenses. On or about May 1st, 1936, the Register of the District Land Office notified plaintiffs that new temporary licenses would be granted them upon payment of the first installments for the grazing season of 1936–1937. On May 25th, 1936, defendant Brooks notified plaintiffs and other applicants for new temporary licenses that unless they paid the first installments of their 1936–1937 grazing fees and obtained their new temporary licenses by June 15, 1936, they would be considered in trespass under the provisions of said grazing act, and would be punished by a fine of not more than $500.00 as provided therein.
80 The complaint, which is lengthy, further alleges that in fixing the fees for temporary licenses no attempt was made "to ascertain the character of the public range used in any particular case, the type of feed thereon, the distribution thereof of water available for livestock, the economic condition of the particular stockmen dependent thereon, the respective abilities of the stockmen dependent thereon to meet commercial competition, the existing market prices for the various types of livestock, the distance of such range from shipping facilities, or any other standard of reasonableness in each case."

It is further alleged that the various portions of the public range within the several grazing districts differ so widely in quality and general characteristics that a fee which is reasonable as to one grazing district is not reasonable as to another, and a fee which is reasonable as to one portion of a given grazing district is not reasonable as to another portion of the same district.

Paragraph 6 of the complaint reads as follows: "In general, the public range in Nevada is the most dependent upon appropriated water and companionate agricultural and grazing lands of any public grazing lands in the United States. The portions of the public range on which plaintiffs graze their livestock are wholly dependent upon appropriated water and companionate lands for economical and beneficial use and it is necessary to invest large sums in improvements of headquarters units, water rights, winter feed facilities, etc., before livestock can be raised successfully. Most of the cattle produced by plaintiffs and other stockmen similarly situated are what is known as 'feeders,' that is, cattle which must be fattened in some other section of
81 the country before they are fit for slaughter. Furthermore, because of the erratic production of feed on Nevada ranges due to semi-arid climatic conditions and the great extreme of changes in temperature and moisture, on the average less than twenty out of every hundred head of cattle raised can be marketed as feeders each year and the receipts from these cattle must pay for the expense of supporting the entire one hundred head. The sheep raised by plaintiffs and others similarly situated must be ranged on special lambing grounds in spring; must be 'lambed' before shearing or shorn before 'lambing,' depending entirely on weather conditions; must be taken to the higher mountains for summer range; the lambs shipped to market in Fall; the ewes trailed to the winter range depending while on the trail on snow for watering, and in Spring again trailed north for shearing and lambing. Such perennial trailing to and from one winter range, and such shearing and lambing in adverse weather conditions, often subjects the bands of sheep to losses ranging from a small percentage to as great as seventy-five per cent. In addition to such adverse conditions, when the steers thus raised and the lambs thus raised are ready for market, they must be disposed of irrespective of the prices offered for same. The margin of profit, by reason of such conditions, both as to sheep and cattle, is so small that the imposition of additional charges of overhead or operating costs, even though appearing nominal, threaten to destroy said industries in the said Grazing District No. 1."

It is also pointed out in the complaint that the licenses required by the Rules of March 2, 1936, are temporary and rev-

ocable without any qualifications or restrictions upon such right of revocation, whereas section 3 of the Grazing Act
82 requires that permits shall be for a fixed period; that none of the new temporary licenses carries with it any right of renewal, whereas said section 3 provides that permittees complying with the Secretary's rules and regulations shall not be denied renewal of their permits if such denial will impair the value of the grazing units when pledged as security for bona fide loans; and that plaintiffs' water rights are jeopardized because the temporary licenses are revocable without qualification or restrictions as aforesaid.

The District Land Office has refused to issue plaintiffs their new temporary licenses unless and until the required fees be paid, and defendant has threatened to prevent plaintiffs from grazing their livestock on those portions of the public range in Nevada Grazing District No. 1 heretofore for many years used by them for that purpose, unless such fees be paid; he has further threatened that if plaintiffs attempt to so graze their livestock without payment of the fees, they will be subject to an action for trespass and to a fine of not more than $500.00 and to the other liabilities and penalties provided in the Grazing Act.

Subdivision (c) of Paragraph 17 of the complaint alleges that: "If plaintiffs are forced to pay the grazing fees assessed against them under said illegal and void Rules on March 2, 1936, under protest, and to rely on their ability to recover back the sums so paid from the defendant Brooks, or from the various federal, state, and local authorities who receive the proceeds thereof, the plaintiffs will suffer great inconvenience and expense in conducting their businesses during the coming
83 year, and, as to some of the plaintiffs, their businesses will be disrupted entirely, and it will be impossible for such plaintiffs to obtain the money necessary to operate their businesses during the coming year. Each and every one of the plaintiffs, for the purpose of meeting his overhead expenses and operating costs and expenses in the said business of raising and selling livestock, is strictly limited to definite sources of income. As to a large group of said plaintiffs, they are, and each of them is, financed through borrowed money lent to them by the Regional Agricultural Credit Corporation of Salt Lake City, Utah, the Nevada Livestock Production Credit Association, or other similar governmental loan agencies engaged in the business of lending funds of the Reconstruction Finance Corporation of the United States of America, by accepting the notes of said plaintiffs in said class and rediscounting the same with the said Reconstruction Finance Corporation, the Federal Reserve Bank,

the Federal Intermediate Credit Bank, or other government bank agencies. Such funds, lent as aforesaid for overhead and operating costs, are limited by what is known as a 'Budget Allowance' set up and fixed at the beginning of the loan term, and are allowable and payable in fixed, agreed amounts monthly during said term, and no funds in excess of said budget allowances are available to such plaintiffs. At the time the budgets were fixed and allowed for all plaintiffs in said class, no attempt had been made to levy or to collect any grazing fees as a condition precedent to the right of said plaintiffs to graze their livestock on the public range, and, accordingly, no such item of grazing fees was or is provided for in such budgets. Such plaintiffs in such class have no other means of income and
84 are therefore unable to pay said grazing fees. As to the remainder of said plaintiffs, not financed as aforesaid through such government loan agencies, their sources of revenue for payment of overhead and operating expenses are nevertheless limited to fixed and definite available sums. Such sums in like manner as the available funds of those plaintiffs financed through Government agencies as aforesaid, are definitely allocated to definite overhead or operating expenditures, and there is no surplus or overplus after such allocation and application. Such plaintiffs are entirely unable to pay the said grazing license fees."

It is further alleged that should defendant attempt to enforce the said rules subjecting each of the plaintiffs to a fine and other penalties and barring them from grazing their livestock as aforesaid, "Plaintiffs' livestock will die of starvation, and plaintiffs will lose the large sums of money which they have invested in said livestock, and in agricultural and grazing lands, improvements, water rights, dams, ditches, canals, reservoirs, dipping vats, and other real and personal property."

Defendant demurred to the complaint upon the grounds that, (1) it failed to state a cause of action, (2) the Secretary of the Interior is an indispensable party defendant, (3) the United States is an indispensable party defendant since its property rights are involved, and (4) the court was without jurisdiction because the action is in essence a suit against the United States which has not given its consent to be sued. The demurrer was overruled, and defendant elected not to plead further. Thereupon his default was entered, and the court adjudged that
85 the Director of Grazing and the Secretary of the Interior had no authority to promulgate the rules requiring plaintiffs to pay the fees as set forth in said complaint as a prerequisite to grazing their livestock under the temporary licenses, and enjoined defendant "from barring, or threatening to bar, plain-

tiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 in default of payment of the grazing fee of five cents per month or fraction thereof per head of cattle, and one cent per month or fraction thereof per head of sheep, grazed upon such public range and in default of obtaining a new temporary license as required by said rules of March 2, 1936."

The first point urged on this appeal is that the trial court erred in holding that the United States was not an indispensable party defendant, and in holding that it had jurisdiction over the action which, appellant contends, was in essence a suit against the United States without its consent. With this contention we do not agree. United States v. Dewar et al., 18 F. Supp. 981; Ferris v. Wilbur, 27 F. (2d) 262; Philadelphia Co. v. Stimson, 223 U. S. 605, 32 S. Ct. 340, 56 L. Ed. 570; Work v. Louisiana, 269 U. S. 250, 70 L. Ed. 259, 46 S. Ct. 92.

Nor do we find merit in appellant's second specification of error, that the district court erred in holding that the Secretary of the Interior was not an indispensable party defendant. State of Colorado v. Toll, 268 U. S. 228, 69 L. Ed. 927, 45 S. Ct. 505; 28 Am. Jur. 453, § 276, n. 12.

Appellant's third and last specification of error is that the lower court erred in holding that the complaint stated
86 facts sufficient to constitute a cause of action. This specification is based upon the contention that the grazing officials had the authority, under § 2 of the grazing Act, and independent of § 3 thereof, not only to issue temporary licenses and collect grazing fees, but also to collect the very fees prescribed by the Rules, to wit, five cents per head per month, or fraction thereof, for each head of cattle or horses, and one cent per month, or fraction thereof, for each sheep or goat.

In support of appellant's position, it is pointed out that delegations of power such as that in section 2 of the Grazing Act should be broadly construed in order to effectuate the policy and intent of Congress; that besides the wording of the Act itself, the court, in endeavoring to ascertain the intent of Congress, should consider the history and purposes of the Act; that, in providing for the issuance of temporary licenses and collection of fees, the Secretary of the Interior is not acting under section 3 of the Act but under section 2 thereof, and that such action is the only effective means of beginning to carry out the policy and intent of Congress; that in the case of United States v. Grimaud, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 513, language very similar to that of section 2 was held by the Supreme Court of the United States to authorize the charging of fees for the privilege of grazing livestock in the National Forests; that it

must have been apparent to Congress that before the Grazing Act could be administered on a permanent basis, considerable time would elapse; that prompt action was essential in order to protect the public domain from present evils and abuses; that it was imperative that the temporary licenses be re-
87 vocable and carry no right of renewal, because they were to be replaced by permits under section 3, and it was impossible to foretell when that would be; that the language of section 2 is mandatory, while that of section 3 is discretionary; that the issuance of temporary licenses is not expressly prohibited either in section 3 or elsewhere in the Act; that the Act should not be interpreted so as to tie the hands of the Secretary while the necessary data are being collected and studied to afford a basis for the issuance of permits under section 3; that notwithstanding the Secretary was not obliged to follow the procedure set forth in section 3 for fixing the fees to be charged for the temporary licenses, he nevertheless took great care to make sure that the fees would be reasonable by adopting the rates voted by a majority of the hundreds of delegates from the eleven western states at the Salt Lake conference, thus showing that his action was not arbitrary or capricious, but rather an honest endeavor to begin to fulfill the mandate of Congress as required by section 2 of the Grazing Act; that whether the fees are reasonable or not in any given case is not to be determined by what someone else is paying, but what is being paid in the particular case; that if any piece of land is worth grazing on at all, it is worth at least one cent an acre for sheep and five cents an acres for cattle; that the fees collected go right back into the ranges for their improvement and rehabilitation and in order to get the data requisite for the issuance of permits under section 3; that, while some grazing areas are better than others, it must be remembered that more livestock per acre are grazing on such lands than on others where there is less forage, and for this reason it makes no difference whether or not one licensee has
88 better grazing land than another, because the one having the better grazing land grazes more livestock, so that the matter of the reasonableness of the fees equalizes itself; that it makes no difference whether the fees are reasonable in each case or not if they are authorized under section 2; that, in construing the Grazing Act, the court should bear in mind some of the practical problems with which the Secretary was faced; that, after ascertaining which public lands out of the total of 173,000,000 acres were "chiefly valuable for grazing and raising forage crops," he was to set up grazing districts embracing not to exceed 80,000,000 acres; that more than 15,000 persons had been using the public range, grazing thereon more than 8,000,000

livestock annually; that in order to comply with the provisions of section 3, it was necessary to determine which of these persons had priority rights and to what extent; that the capacity of the range in many places had been impaired, and that if these lands were to be restored, and inauguration of protective and rehabilitation measures was immediately necessary, and in the meantime if these ranges were not to be destroyed or the livestock industry disrupted, some temporary modus operandi had to be devised; that the reason of the law should prevail over its letter; that the meaning of parts of a statute should be controlled by the general intent of the whole act; and that the contemporaneous and considered interpretation of an act by the administrative agency charged with its enforcement is not to be lightly disturbed by the courts.

As a further extrinsic aid to construction, appellant urges
89 that temporary licenses and the grazing fees fixed by the Rules of March 2, 1936, have been ratified by Congress. In the first place, Congress, knowing that the public range was being administered by the Secretary of the Interior under the temporary license system and on a fee basis, has for several years appropriated money for range improvements on the basis of the amount of fees collected in the several grazing districts, such fees being the only moneys collected under the authority of the Grazing Act prior to 1939. Secondly, Congress, in June 1936, knowing that the Division of Grazing was operating under a temporary license and fee system, widened the scope of section I of the Act by extending its provisions to a further 62,000,000 acres of the public domain, and at the same time amended four other sections of the original Act, but left sections 2 and 3 unchanged, though aware of the construction which had been placed on them by the Secretary.

Respondents, on the other hand, defending the action of the lower court in overruling defendant's demurrer, contend that section 2 cannot be construed to confer authority to charge fees, because section 3 confers a specific and strictly limited grant of authority so to do; that where an act contains both general and specific provisions relating to a particular subject, the specific provisions must govern in respect to that subject, and this is true even though the general provisions, standing alone, might be broad enough to include the subject to which the more particular provisions relate; that the Rules of March 2, 1936, establishing uniform fees throughout the entire public range,
90 violate that provision of § 3 which requires that the fees are "in each case to be fixed or determined from time to time"; that the licenses, being temporary and revocable, do not provide the stockmen with the certainty of tenure intended by

§ 3; that under the temporary licenses the rights of renewal conferred by the provisions of § 3 have been ignored and destroyed; that the valuable water rights which, under the provisions of § 3, are not to be diminished or impaired, can be destroyed at any time under the temporary licenses; that the Forest Reserve Act, construed by the Supreme Court of the United States in the case of United States, v. Grimaud, supra, conferred only a general power to regulate, and contained no provisions like those in § 3 of the Grazing Act limiting and qualifying the procedure to be followed if the Secretary should choose to license the use of the range; that if § 2 authorizes the Secretary to charge the fees prescribed by the Rules of March 2, 1936, § 3 might as well never have been written; that even if the Secretary was compelled to take steps to protect the range pending the organizing of a permanent system of administration, it cannot be said that it was necessary for him to violate the provisions of § 3 by charging fees for grazing privileges which do not comply with that section.

Respondents point out that the purpose of the Grazing Act, as stated in the preamble, is not only "to stop injury to the public grazing lands by preventing overgrazing and soil deterioration," and "to provide for their orderly use, improvement,
91 and development," but also "to stabilize the livestock industry dependent upon the public range." They argue that the effect of those portions of the Rules of March 2, 1936, which they claim to be invalid is rather to make the livestock industry unstable.

Regarding the reasonableness of the fees, respondents say that the maintenance of competitive conditions between stockmen using the semi-arid lands of Nevada and the stockmen in more fertile state requires the payment of fees commensurate with the grazing value of the public land that is used; that over an area of 162,000,000 acres of land in eleven states, where some of the range is meadow land or fine bunch grass, while other portions are salt grass or alkali flats, the uniform five-cent and one-cent rates cannot be "reasonable in each case." Respondents further call attention to the fact that appellant, by electing not to answer their complaint in the court below, admitted all the material facts therein alleged, including the allegations which, as contended by respondents, show that the fees were unreasonable as to each and all of them.

In appellant's opening brief, counsel refer to the report which Mr. Taylor made in introducing the Grazing Bill in the House of Representatives. 78 Cong. Rec., Part V, pp. 5370–5376. In re-

spondents' brief, counsel quotes from the same report as follows: "Returning to the bill before us I may say this bill originally started with about a dozen lines, just putting all this public domain under the jurisdiction of the Interior Department, to be administered for the general welfare of the Government and for the public good. But we have been adding to it all the time until now the bill contains 10 pages, consisting quite largely
92 of just unnecessary regulations written into the bill. The Secretary could do practically everything that is provided for in the bill if we had simply turned it over to him. Nearly all these things could be provided for by regulations. However, many people are not willing to give just carte blanche provisions of that kind in the bill. They, with some justification, feel that there are some things that they should specifically provide for or reserve in the law itself for their guaranty." 78 Cong. Rec., Part V, p. 5372.

On the oral argument of this case it was stated by counsel for appellant that Mr. Taylor had said it might take forty, fifty, or sixty years to put all the grazing lands under administration. Counsel did not think this statement well founded, and stated that permits under § 3 were already being issued in Colorado and New Mexico. On the other hand, the Act was passed in June 1934, and respondents' counsel point to the fact that in Nevada Grazing District No. 1 the system of temporary licenses is still being employed after six years, and no one can tell how long it will be until permits will be issued in that district. Respondents do not question the right of the Secretary, under § 2, to make rules and regulations as to when stock may and may not graze on the range, where the different kinds of stock may be grazed, and as to following proper range practices in handling the stock. They insist, however, that in making such rules and regulations, the Secretary does not have the right to ignore § 3 or to act entirely independent of that section.

Finally, respondents controvert appellant's contention that the license fees complained of have been ratified by
93 congressional appropriation acts, or by Congress's amendment, in 1936, of various sections of the Grazing Act other than §§ 2 and 3, while leaving these two sections unchanged.

Where the language of a statute is plain, certain and free from ambiguity, judicial construction is unnecessary. But the intention of Congress, as regards the charging of fees for grazing livestock on the public range, is not clear in all respects. We have to consider, on the one hand, the decision of the United States Supreme Court in the case of United States v. Grimaud, construing a provision in the National Forests Act very similar to § 2 of the Grazing Act, as well as the history and purpose of

the latter act, the evils to be remedied by it, and the action of Congress in making appropriations from year to year based on estimates of sums to be collected from the users of the public range. On the other hand, it must be borne in mind that the National Forests Act contained no such special provision relating to the payment of fees as we find in § 3 of the Grazing Act. It is not for this court to say whether it would have been better had Congress specially provided that the Secretary, in the matter of charging fees, could proceed under § 2 without regard to § 3 until such time as sufficient data could be gathered upon which to issue permits and collect fees under the provisions of the latter section. In construing either of these sections, we are not at liberty to disregard the provisions of the other. In seeking the legislative intent, we must look at the whole act, giving effect, if possible, to all its parts and endeavoring to harmonize them.

In a very recent decision of the United States District Court for the District of Nevada it was held that the
94 Rules of March 2, 1936, insofar as they purported to authorize the collection of fees based on the uniform five-cent and one-cent rates, were void. United States v. Achabal, 34 F. Supp. 1. As the Grazing Act is an act of Congress, the Achabal case is entitled to great weight as persuasive authority. Black's Law of Judicial Precedents, § 113, p. 374; United States Law Review, September 1935, Vol. LXIX, pp. 449–454; 14 Am. Jur. 339, § 121; 21 C. J. S. 377, § 206. Whether the Achabal case is absolutely binding on this court need not be determined, because the conclusion arrived at in that case is not at variance with that to which we have come after an independent consideration of the questions presented in the case at bar.

Under § 2 rules may be adopted, consistent with other provisions of the Statute, for the prevention of such evils as overgrazing, for improving range conditions, fixing range boundaries, prescribing the areas which may or may not be grazed, who may make use of the range, the areas which may be grazed by the different kinds of livestock, setting the opening and closing dates of the grazing seasons for cattle and for sheep, requiring proper range practices in handling livestock, and prescribing other regulatory measures. But the charging of fees is not essential to regulation, and even if it be conceded that § 2 authorizes not only the issuance of temporary licenses but also the collection of fees for
95 grazing livestock on the public range, a careful study of the Grazing Act shows, in our opinion, an intention on the part of Congress that all fees collected must be "reasonable fees in each case to be fixed or determined from time to time." We do not feel at liberty to read into the statute a provision that fees fixed upon any other basis may be collected for an indefinite

number of years until the desired data be collected for issuing permits and collecting fees under § 3.

Appellant contends that as § 3 merely authorizes the issuance of permits upon the payment of reasonable fees in each case, it is discretionary with the Secretary whether he will proceed under that section, and that he is thus left free, on the authority of United States v. Grimaud, to charge fees under § 2, independently of the limitations in § 3. We do not so read the statute. In our opinion, the authority to issue permits "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time" excludes the right to collect grazing fees not based on a system conforming to that limitation.

Whatever may be said in favor of the uniform rates approved by a majority of the delegates to the Salt Lake City conference, they do not conform to the limitations prescribed in § 3. The idea of fees determined on the basis of uniform rates for livestock grazing on the millions of acres of public range land scattered througout eleven western states, without taking into consideration the different conditions to be found in various portions of this vast domain, cannot be reconciled with the idea of "reasonable fees in each case to be fixed or determined from time to time." It is a matter of common knowledge among the stockmen of the far western states that the base rates on grazing
96 fees in the national forests are not the same in every national forest, either for cattle or sheep. The fact that more livestock are allotted to areas producing good forage than to grazing areas of poorer quality does not operate to equalize the matter of reasonableness of grazing fees. Other factors must be taken into consideration, some of which have been mentioned in the complaint in this action and in the opinion of Honorable Frank H. Norcross in the Achabal case.

In the lower court, defendant did not move to strike out any part of the complaint as being irrelevant or immaterial. N. C. L., 1929, § 8623. Having elected to stand on his demurrer, every relevant and material fact alleged in the complaint must be accepted as true. As we are of the opinion that the complaint states facts sufficient to constitute a cause of action, that the trial court had jurisdiction of the person of the defendant and of the subject matter of the action, and that there is no defect of parties defendant, the judgment appealed from must be affirmed.

The court does not hold, as matter of law, that § 2 of the Grazing Act does not authorize the issuance of temporary licenses or the charging of grazing fees; nor do we determine whether, under the provisions of that section, some system of temporary licenses and payment of fees can be devised which,

even if not entirely perfect, will yet be consistent with § 3. The action of Congress in making appropriations based on estimates of fees to be collected under the licensing system lends considerable support to the view that Congress has ratified
97 the issuance of temporary licenses and the charging of fees to the licensees for grazing their livestock on the public domain; but even if this view were to be accepted, nothing has been presented in this case which would justify us in going further and holding that, regardless of and contrary to the provisions of § 3, the fees could legally be based upon the uniform rate prescribed by the Rules of March 2, 1936, or that any part of said Rules can be held valid if inconsistent with that section or any other provisions of the Grazing Act.

TABER, *C. J.*

We concur:

DUCKER, *J.*

ORR, *J.*

Attest: This is a full, true, and correct copy.

CHAS W. GUTHRIE,
Official Reporter.

97a In Supreme Court of Nevada

No. 3287.

L. R. BROOKS, APPELLANT

vs.

ARCHIE J. DEWAR, ET AL, RESPONDENTS

Appeal from the Second Judicial District Court, in and for Washoe County, Nevada

Hon. A. J. Maestretti, District Judge

Judgment

Oct. 24, 1940

This case came on regularly to be heard on the 18th day of March, A. D., 1940, it being a regular day of the January, A. D., 1940 term of this court, when Hon. Wm. B. Holst, of counsel for appellant, and Hon. Milton B. Badt, of counsel for respondents, both being in court, were each duly heard in oral argument on the merits of the case for their respective clients.

Now, on this day, all and singular the law and the premises having been seen, heard, and duly considered and the court being fuly advised in the law, files with the clerk of this court its opinion in writing by Taber, C. J., concurred in by Ducker, J., and Orr, J., to the effect:

"The judgment appealed from must be affirmed."

Whereupon, it is now ordered, adjudged and decreed as quoted above.

Judgment entered this 24th day of October, A. D., 1940.

Attest: Margaret I. Brodigan, Clerk.

97b [Clerk's certificate to foregoing paper omitted in printing.]

[No. 3287. In the Supreme Court of the State of Nevada. L. R. Brooks, Appellant vs. Archie J. Dewar, et al, Respondents. Copy of Judgment. Filed October 24, 1941. Margaret I. Brodigan, Clerk.]

98 In Supreme Court of Nevada

[File endorsement omitted.]
[Title omitted.]

Order granting motion to remand record

Filed Nov. 15, 1939

Pursuant to stipulation dated November 14, 1939, between appellant and respondents, it is hereby ordered that appellant's pending motion for an order remanding the transcript of record on appeal herein to the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, for amendment and correction, filed herein September 23, 1939, so as to include therein (1) the notice of appeal, filed June 23, 1939, and (2) the undertaking on appeal, filed June 23, 1939, be, and the same is hereby, ordered granted; and

It is further ordered that said record on appeal be returned forthwith by the Clerk of this Court to Honorable E. H. Beemer, Clerk of the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, with directions to the said Clerk of said District Court to annex to said record on appeal the said notice of appeal, filed June 23, 1939, and the said undertaking on appeal, filed June 23, 1939, and that after annexing said documents to said record on appeal, the said

Clerk of said District Court shall forthwith return said
99 corrected and amended record on appeal to the Clerk of this Court.

Done at Carson City, Nevada, this 15th day of November 1939.

E. J. L. TABER,
Chief Justice, Supreme Court.

Attest: MARGARET I. BRODIGAN, *Clerk.*

100 In Supreme Court of Nevada

[File endorsement omitted.]
[Title omitted.]

Stipulation

Filed Nov. 15, 1939

It is hereby stipulated by and between the parties to the above-entitled appeal, through their respective counsel, as follows:

I

Appellant's pending motion for an order remanding the transcript of record on appeal herein to the District Court of the Second Judicial District of the State of Nevada, in and for the County of Washoe, for amendment and correction, filed herein September 23, 1939, so as to include (1) the notice of appeal, filed June 23, 1939, and (2) the undertaking on appeal, filed June 23, 1939, may be granted.

II

Respondent's pending motion to dismiss the appeal and strike the record on appeal, filed herein October 2, 1939, is hereby withdrawn.

III

The pending motion of Petan Land & Cattle Company to be substituted in the place and stead of J. B. Garat, Sr., et al., doing
101 business under the name and style of Garat & Co., filed herein October 2, 1939, is hereby withdrawn.

IV

The setting of oral argument on the said pending motions for November 15, 1939, may be vacated.

V

Orders may be made by the above-entitled Court in conformance with this stipulation.

Dated this 14th day of November 1939.

MILTON B. BADT,
Of Counsel for Respondents
and Attorney for Petan Land & Cattle Company.

MILES N. PIKE,
United States Attorney
Of Counsel for Appellant.

102 [Clerk's certificate to foregoing transcript omitted in printing.]

U. S. GOVERNMENT PRINTING OFFICE: 1941

Supreme Court of the United States

Order allowing certiorari

Filed March 10, 1941

The petition herein for a writ of certiorari to the Supreme Court of the State of Nevada is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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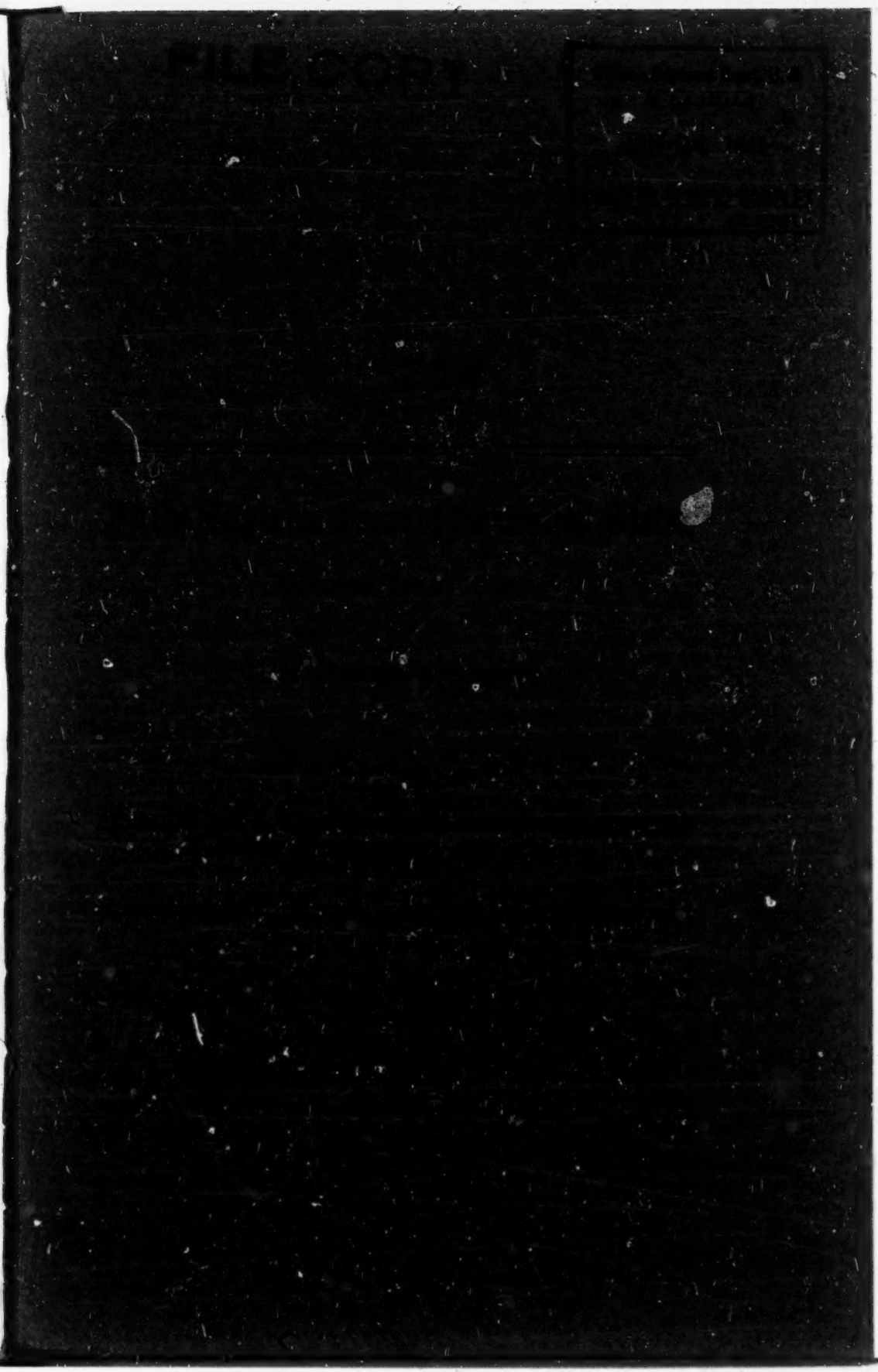

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INDEX

CITATIONS

In the Supreme Court of the United States

OCTOBER TERM, 1940

No. ——

L. R. BROOKS, PETITIONER

v.

ARCHIE J. DEWAR ET AL.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

The Solicitor General, on behalf of L. R. Brooks, the Regional Grazier of the United States for Region Three, prays that a writ of certiorari issue to review the judgment of the Supreme Court of Nevada entered in the above case on October 24, 1940, affirming the judgment of the District Court of the Second Judicial District of Nevada in and for the County of Washoe.

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (R. 42–57) is reported in 106 P. 2d 755. The District Court did not write an opinion.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Nevada sought to be reviewed was entered on October 24, 1940 (R. 57). The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the decision below denied rights, titles, and immunities claimed by the petitioner under the Constitution, statutes, and authority of the United States.

The court below, on the theory that the Secretary of the Interior lacked authority under the Taylor Grazing Act to charge a low uniform fee for temporary grazing licenses, ordered the Regional Grazier to permit certain stockmen in Nevada to graze their livestock on the public domain "in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license" prescribed by the Secretary's rules and regulations (R. 32–35, 57–58). This decision vitally affects the orderly administration of the Taylor Grazing Act; it confers on Nevada stockmen a right to use the public lands of the United States without the Government's consent; and it invalidates rules and regulations of the Secretary of the Interior in a proceeding to which he was not a party. Hence, the decision below involves federal questions. These questions were raised by petitioner in the District Court (R. 31) and were argued by him in the Supreme Court of Nevada (R.

50). The grounds upon which it is contended that the questions involved are substantial are set forth under the Reasons for Granting the Writ, *infra*, pp. 7–17.

QUESTIONS PRESENTED

1. Whether under the Taylor Grazing Act the Secretary of the Interior has authority, pending the collection of the data necessary for the issuance of term permits, to charge a low uniform fee for temporary licenses issued to persons grazing livestock on public lands within grazing districts established under that Act.

2. Whether the United States is an indispensable party to a suit brought by stockmen in Nevada to compel the Regional Grazier to permit them to graze their livestock on the public range in that state without procuring a temporary license and without incurring liability for the fees prescribed therein.

3. Whether the Secretary of the Interior is an indispensable party to a suit brought to enjoin a subordinate from enforcing rules and regulations which the Secretary himself promulgated.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269 (R. 15–23), as amended by the Act of June 26, 1936, c. 842, 49 Stat. 1976, and of the regulations of the Secretary of the Interior issued thereunder (R. 23–27), are printed as an appendix, *infra*, pp. 18–28.

STATEMENT

Prior to 1934 settlers in the West enjoyed an implied and unrestricted license to graze livestock on the public domain free of charge. This unregulated use of the public lands of the United States resulted in numerous abuses which led to the adoption of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, 43 U. S. C., secs. 315 *et seq.*, an Act designed, as its title indicates, "To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, [and] to stabilize the livestock industry dependent upon the public range".

This Act is a comprehensive statute, requiring the Secretary of the Interior to ascertain which public lands (out of a total of 173,000,000 acres in the western states)[1] are "chiefly valuable for grazing and raising forage crops", and from such lands to designate grazing districts embracing not to exceed 142,000,000 acres.[2] Once these districts are established, the Secretary is *directed* (section 2) to "make provision for the protection, administration, regulation, and improvement of such grazing districts", to "make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary

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[1] Hearings, H. Committee on Public Lands, H. R. 2835, 73d Cong., 1st sess., and H. R. 6462, 73d Cong., 2d sess. (1934), pp. 6, 7, 18.

[2] Amendatory Act of June 26, 1936, c. 842, 49 Stat. 1976.

to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range".

In carrying out the Act the Secretary is *authorized* (section 3) to issue term permits "to such bona fide settlers, residents, and other stock owners *as under his rules and regulations* are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time".[1] In issuing these permits preference is to be given "to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them". All permits are to be renewed if their denial will "impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan."

After establishing the grazing districts contemplated by the Act, and pending the collection of information prerequisite to the issuance of the term permits authorized by section 3, the Secretary of the Interior, acting under section 2, promulgated regulations setting up a system of tem-

[1] Italics are ours throughout this petition.

porary licenses and uniform fees. That this system was not to be permanent was apparent from the regulations themselves (R. 23):

> Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle the owners, occupants or lessees to a preferential grazing privilege.[4]
>
> During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Thereafter, some forty persons who are engaged in the business of grazing livestock in Nevada, instituted the present suit in the state court against L. R. Brooks, the Regional Grazier of the United States for Region Three, to enjoin him from enforcing the licensing and fee provisions prescribed by the Secretary's regulations. The complaint alleges that the Act gives the Secretary no authority to require temporary, revocable licenses, as distinguished from term permits, that the Secretary has no authority to charge fees for such licenses, and that the grazing fees required by the regulations were fixed without any attempt to determine what would be a reasonable fee in

[4] Cf. 43 Code of Federal Regulations, sec. 501.1 (c).

each case (R. 8–9). Brooks demurred on the grounds (1) that the complaint does not state a cause of action; (2) that the Secretary of the Interior is an indispensable party and has not been joined; (3) that the suit is one against the United States to which it has not consented (R. 31). The demurrer was overruled and, upon Brooks' failure to answer further, judgment was entered enjoining him "from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range" in Nevada "in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license" prescribed by the departmental rules and regulations (R. 35).

The Supreme Court of Nevada affirmed (R. 57). It held that the suit was not one against the United States, and that the Secretary was not an indispensable party (R. 50). After expressly refusing to decide whether section 2 of the Taylor Grazing Act authorizes the issuance of temporary licenses or the charging of grazing fees (R. 56), the court held that in any event fees could not "legally be based upon the uniform rate prescribed by the Rules" (R. 57).

REASONS FOR GRANTING THE WRIT

1. *The decision below affects the orderly administration of an important federal statute, and is probably incorrect.*—Prior to 1934 more than

15,000 persons had been using the public range under an implied license, grazing thereon more than 8,000,000 head of livestock annually.[5] Although the Taylor Grazing Act terminated this implied license,[6] it nevertheless recognized that previous users should be accorded certain priority rights, to be based upon citizenship, residence in or near a grazing district, the ownership of other grazing facilities, water rights, etc.

The determination and allocation of grazing privileges among prior users in accordance with these provisions was not a simple administrative undertaking which could be accomplished speedily. A hasty and improper issuance of term permits could have disastrous consequences. If too many were issued, the evils which the Act was designed to remedy, such as overgrazing, soil erosion, and range destruction, would be continued and even aggravated, and the mortgage provision of section 3 frequently would prevent the subsequent cancellation of permits. On the other hand, if too few were issued, the livestock industry would be completely disrupted during the transition period. It is therefore obvious that some temporary *modus operandi* had to be devised

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[5] Cf. Annual Report, Sec'y Int., 1937, pp. 105–106.

[6] See *Buford* v. *Houtz*, 133 U. S. 320; *United States* v. *Grimaud*, 220 U. S. 506, 521; *Light* v. *United States*, 220 U. S. 523, 535; *Itcaina* v. *Marble*, 56 Nev. 420, 432–433, 55 P. 2d 625 (1936).

pending the collection of the necessary data for the issuance of term permits.[7]

A system of temporary licenses, for which a uniform fee was to be charged, was accordingly set up. There can be no doubt that section 2 of the Act, if it stood alone, would be ample authority for the licenses in question, because a comparable licensing system based on similar language in the Forest Reserve Act was upheld by this Court in *United States* v. *Grimaud,* 220 U. S. 506, and *Light* v. *United States,* 220 U. S. 523. But respondents in their briefs below contended, and the Nevada courts seem to have agreed, that the general grant of authority contained in section 2 of the Taylor Grazing Act is limited by the provisions of section 3 which deal with the issuance of term permits.

It is submitted, however, that the provision in section 3 that permits are to be issued "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time", does not preclude the issuance of temporary licenses, or even permits, at a low uniform fee. The present

[7] In fact, after six years, the task is only now nearing completion. Term permits have been issued in one district and authorized in another. During the next few months, permits are to be issued to approximately 50% of the present holders of temporary licenses, with additional permits in succeeding years as the necessary data is finally correlated. The Department of the Interior states that Nevada Grazing District No. 1, where this suit arises, cannot be placed on a permit basis for at least another year.

rates (5¢ a month for each head of cattle and 1¢ for sheep) are regarded by the Department as far below the actual value of the public range, and hence not unreasonable in any particular case.[8] The "reasonable fee" provision of section 3 was inserted for the benefit of the stockmen—to prevent *excessive* exactions. If the Government elects to charge a lower fee, the stockmen cannot complain.

That a system of term permits could not be immediately instituted in all grazing districts throughout the West was known to Congress when it passed the Act. For example, Associate Forester Sherman had told the Public Lands Committee in 1933 that "There is not in the country an organization that would be prepared or equipped to put all of these [public] lands under administration tomorrow. It will have to be done gradually." [9] Mr. Taylor, the sponsor of the Act, was of a similar opinion: "Of course, it will take some time to readjust the grazing rights [under the new Act]." [10]

Furthermore, the contemporaneous and considered interpretation of an act by the administrative agency charged with its enforcement is not lightly

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[8] The greater part of these fees are expended for rehabilitation purposes, range improvements, etc., as provided for by section 10 of the Act.

[9] Hearings, H. Committee on Public Lands, H. R. 2835, 73d Cong., 1st sess., and H. R. 6462, 73d Cong., 2d sess. (1934), p. 51.

[10] *Ibid.*, p. 77. Cf. similar observations made to the committee by Secretary Ickes, *ibid*, p. 136.

to be disturbed by the courts. *Brewster* v. *Gage*, 280 U. S. 327, 336; *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378.

Finally, even if there were some doubt whether the Act as originally drafted authorized the regulations complained of, it is submitted that Congress has by subsequent legislation ratified the system of temporary licenses of which respondents complain:

In the first place, Congress, knowing that *permits* were not being issued and that fees were being charged for *temporary licenses*,[11] has made annual appropriations for range improvements on the basis of such collections,[12] and has thus impliedly ratified the administrative practice of issuing temporary licenses on a fee basis.

In the second place, Congress in 1936 virtually reenacted the Taylor Grazing Act by extending its

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[11] Annual Report, Sec'y Int., 1936, pp. 14–17; *ibid.*, 1937, pp. xii, 102, 105–108; *ibid.*, 1938, pp. xv, 107, 109, 113; 81 Cong. Rec., pt. 3, pp. 2738–2739 (1937); 83 Cong. Rec., pt. 9, p. 2376 (1938); 84 Cong. Rec., pt. 3, pp. 2734–2736 (1939); Hearings, Subcommittee of H. Committee on Appropriations, H. R. 10630, 74th Cong., 2d sess. (1936), pp. 13–15; *ibid.*, H. R. 6958, 75th Cong., 1st sess. (1937), pp. 83, 89; *ibid.*, H. R. 9621, 75th Cong., 3d sess. (1938), pp. 65, 70, 71; H. Rept. No. 1927, 74th Cong., 2d sess. (1936), p. 3.

[12] Act of June 22, 1936, c. 691, 49 Stat. 1757, 1758; Act of August 9, 1937, c. 570, 50 Stat. 564, 565; Act of May 9, 1938, c. 187, 52 Stat. 291, 292; Act of May 10, 1939, c. 119, 53 Stat. 685, 687; Act of June 18, 1940, c. 395, Pub., No. 640, 76th Cong., 3d sess.

provisions to another 62,000,000 acres of the public domain. Act of June 26, 1936, c. 842, 49 Stat. 1976. See *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 493.

And lastly, in the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, c. 888, Public, No. 861, 76th Cong., 3d sess., Congress provided for the temporary suspension of "permits *and licenses*" under the Taylor Grazing Act, and for the "remission, reduction, or refund of grazing fees during such suspension." See also Act of July 14, 1939, c. 270, 53 Stat. 1002.

It therefore follows that the regulations complained of are valid, and that the complaint failed to state a cause of action. In a similar suit by stockmen in the Federal District Court for Oregon, seeking to enjoin enforcement of these same regulations, the District Court upheld their validity and the Circuit Court of Appeals for the Ninth Circuit said that it "would be disposed to sustain the court's ruling on that question if it were properly before us", although it went on to hold that the District Court was without jurisdiction because the amount in controversy did not exceed $3,000. *Gavica* v. *Donaugh,* 93 F. 2d 173, 174 (C. C. A. 9).

2. *In holding that the United States is not an indispensable party the decision below is in probable conflict with decisions of this Court.*—It is a general rule that the United States is an indis-

pensable party to any suit brought to acquire an interest in, or the right to use, its public lands. *United States* v. *Minnesota*, 305 U. S. 382, 386; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Louisiana* v. *Garfield*, 211 U. S. 70. There are but two exceptions: first, those situations where the plaintiff already has some interest in the lands in question, an interest which is being unlawfully interfered with by an officer of the United States; and, secondly, those situations where Congress has granted an interest in lands in such explicit terms that its ascertainment is merely a ministerial function enforceable by mandamus.

This case does not come within the first exception. Respondents have no property rights in the public grazing lands in Nevada. Their implied license to graze livestock on such lands was terminated by the Taylor Grazing Act. Cf. *Light* v. *United States*, 220 U. S. 523, 535. Their suit is not one to enjoin an officer of the United States from interfering with their rights in the public range, but rather a suit to compel an officer to permit them to use the public range in conjunction with their private grazing facilities, on the plea that the latter cannot be profitably operated unless respondents are also allowed to make use of the public domain (R. 3–5). Such averments do not bring respondents within the rule enunciated in cases like *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, and *United States* v. *Lee*, 106 U. S. 196.

Nor is this case within the second exception. The preferential status accorded to previous users by the Taylor Grazing Act is not a property right in any particular lands. And although it may ultimately serve as a basis for obtaining a term permit, the Act makes the allocation and determination of grazing privileges among eligible stockmen dependent on so many complex factors that mandamus obviously would not lie to compel the Secretary to allow respondents to graze a specified number of livestock on any particular sections of the public range. Cf. *New Mexico* v. *Lane*, 243 U. S. 52, 58.

If the United States would be an indispensable party to a mandamus action to acquire such a right, it is submitted that a forbidden result can not be indirectly accomplished by a so-called negative injunction. Whether the United States is an indispensable party is to be determined not by the form of the action but rather by the practical effect of the relief sought. *Louisiana* v. *McAdoo*, 234 U. S. 627, 629. Applying that test to this case, it will be noted that respondents requested (R. 14) and obtained (R. 35) a decree enjoining the Regional Grazier "from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range * * * in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license". This injunction obviously affects

the property of the United States. It enables stockmen in Nevada to continue their use of the public range until the Department of the Interior is in a position to issue term permits. This right to use the public lands of the United States is a valuable property right.

Since Nevada stockmen have no rights at present in the lands in question, and since their preferential status does not entitle them to any rights enforceable by mandamus, it is submitted that the United States is an indispensable party to this suit, which is in reality designed to perpetuate a privilege which was revoked by Congress in 1934.

3. *Whether a subordinate official may be restrained from enforcing regulations promulgated by his superior without the joinder of the latter is a question of importance which should be clarified by this Court.*—Judge Learned Hand, in *National Conference on Legalizing Lotteries* v. *Goldman,* 85 F. 2d 66 (C. C. A. 2), has rightly observed that the rationale of the cases on this question is "not yet clear". *Webster* v. *Fall,* 266 U. S. 507, *Gnerich* v. *Rutter,* 265 U. S. 388, and *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, hold that the superior officer must be joined.[13] *Colorado* v.

[13] *Gnerich* v. *Rutter* would appear to be clearly in point. That was a suit by a San Francisco pharmacist to enjoin the local prohibition commissioner from enforcing quantity restrictions placed in a permit issued pursuant to regulations promulgated under the National Prohibition Act by the Commissioner of Internal Revenue. In holding that the

Toll, 268 U. S. 228, though perhaps distinguishable, points the other way. The lower court decisions are in hopeless confusion.[14] This conflict should be resolved.[15] The question constantly recurs and is important to the Government and to private litigants alike.

The court below relied on *Colorado* v. *Toll*, *supra*. If that case, where the question is summarily treated, was intended to overrule uncited cases like *Gnerich* v. *Rutter*, *supra*, and *Webster*

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suit could not be maintained against a subordinate without the joinder of his superior, this Court said (265 U. S. 391–392): "The act and the regulations make it plain that the prohibition commissioner and the prohibition director are mere agents and subordinates of the Commissioner of Internal Revenue. They act under his direction and perform such acts only as he commits to them by the regulations. They are responsible to him and must abide by his direction. What they do is as if done by him. He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied. All this being so, he should have been made a party defendant—the principal one—and given opportunity to defend his direction and regulations."

[14] Compare *Jump* v. *Ellis*, 100 F. 2d 130, 135 (C. C. A. 10), certiorari denied, 306 U. S. 645; *Alcohol Warehouse Corp.* v. *Canfield*, 11 F. 2d 214 (C. C. A. 2); *Moore* v. *Anderson*, 68 F. 2d 191 (C. C. A. 9); *Moody* v. *Johnston*, 66 F. 2d 999 (C. C. A. 9); *Carr* v. *Desjardines*, 16 F. Supp. 346 (W. D. Okla.); *Dami* v. *Canfield*, 5 F. 2d 533 (S. D. N. Y.), with *Rood* v. *Goodman*, 83 F. 2d 28 (C. C. A. 5); *Ryan* v. *Amazon Petroleum Corporation*, 71 F. 2d 1 (C. C. A. 5); *Yarnell* v. *Hillsborough Packing Co.*, 70 F. 2d 435 (C. C. A. 5); *Berdie* v. *Kurtz*, 75 F. 2d 898 (C. C. A. 9).

[15] Cf. (1937) 37 Col. L. Rev. 140; Note (1937) 50 Harv. L. Rev. 796; (1940) 26 Va. L. Rev. 370.

v. *Fall, supra,* where the problem was considered at greater length only a few months before, that fact should be made clear.

CONCLUSION

Wherefore, it is respectfully submitted that this petition for a writ of certiorari should be granted.

FRANCIS BIDDLE,
Solicitor General.

JANUARY 1941.

APPENDIX

Pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, as amended by the Act of June 26, 1936, c. 842, 49 Stat. 1976 (43 U. S. C., Supp. V, sec. 315 *et seq.*):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided,* That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. * * * Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attend-

ance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however,* That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas

subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: *Provided,* That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the

Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further,* That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

* * * * *

Sec. 5. That the Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such

districts of livestock kept for domestic purposes; and provided that so far as authorized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act.

* * * * *

Sec. 10. That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received under this Act during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received under this Act during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts or the lands producing such moneys are situated, to be expended as the State Legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts or the lands producing such moneys are situated: *Provided,* That if any grazing district or any leased tract is in more than one State or county, the distributive share to each from the proceeds of said district or leased tract shall be proportional to its area in said district or leased tract.

* * * * *

Sec. 15. The Secretary of the Interior is further authorized, in his discretion, where

vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: *Provided,* That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except, that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary.

* * * * *

Sec. 17. The President shall have power, with the advice and consent of the Senate, to select a Director of Grazing. The Secretary of the Interior may appoint such Assistant Directors and such other employees as shall be necessary to administer this Act. The Civil Service Commission shall give consideration to the practical range experience in public-land States of the persons found eligible for appointment by the Secretary as Assistant Directors or graziers. No Director of Grazing, Assistant Director, or grazier shall be appointed who at the time of appointment or selection has not been for one year a bona fide citizen or resident of the State or of one of the States in which such Director, Assistant Director, or grazier is to serve.

Pertinent provisions of the Grazing Regulations of March 2, 1936 (R. 23–27): [16]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
DIVISION OF GRAZING
Washington

RULES FOR ADMINISTRATION OF GRAZING DISTRICTS

(Under the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act)

Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.

During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Licenses

Licenses issued in 1936 will be operative only during that year or for such part of 1937 as may be considered the "winter grazing season" as determined by local

[16] These regulations have been amended from time to time, but the changes do not affect the legal problems here involved. The current regulations are to be found in 43 Code of Federal Regulations, secs. 501 *et seq.*

usage, but in no event will extend beyond May 1, 1937.

Such licenses will be revocable for violation of the terms thereof and will terminate on the issuance of permits in a district.

An applicant for a grazing license is qualified if he owns livestock and is:

1. A citizen of the United States of America or one who has filed his declaration of intention to become such, or

2. A group, association or corporation authorized to conduct business under the laws of the State in which the grazing district is located.

The following definitions will be used in issuing licenses only:

Property shall consist of land and its products or stock water owned or controlled and used according to local custom in livestock operations. Such property is:

(a) *"Dependent"* if public range is required to maintain its proper use.

(b) "Near" if it is close enough to be used in connection with public range in usual and customary livestock operations. In case the public range is inadequate for all the near properties, then those which are nearest in distance and accessibility to the public range shall be given preference over those not so near.

(c) *"Commensurate"* for a license for a certain number of livestock if such property provides proper protection according to local custom for said livestock during the period for which the public range is inadequate.

Priority of use.—Is such use of the public range before June 28, 1934, as local custom recognized and acknowledged as a proper

use of both the public range and the lands or water used in connection therewith.

Issuance of licenses

After residents within or immediately adjacent to a grazing district having dependent commensurate property are provided with range for not to exceed ten (10) head of work or milch stock kept for domestic purposes, the following named classes, in the order named, will be considered for licenses:

1. Qualified applicants, with dependent commensurate property with priority of use.
2. Qualified applicants with dependent commensurate property but without priority of use.
3. Qualified applicants who have priority of use but not commensurate property.
4. Other qualified applicants.

Licenses will be issued in the above-named order of classes until the carrying capacity of the public range shall be attained. If a class more than exhausts the capacity of the range, all junior classes will be eliminated, and cuts within the last-recognized class shall be made by reduction of numbers or limitation of seasonal use until the number equal to the fixed carrying capacity of the public range is reached.

Fees

A grazing fee of five (5) cents per head per month or fraction thereof, for each head of cattle or horses and one (1) cent per month, or fraction thereof, for each sheep or goat shall be collected from each licensee except free-use licenses.[17]

* * * * *

[17] Cf. 43 Code of Federal Regulations, sec. 501.16.

General Rules of the Range

The following rules shall supersede all previous rules heretofore promulgated for grazing districts created under the act of June 28, 1934 (48 Stat. 1269), and shall be operative in all grazing districts in the States of Arizona, California, Colorado, Idaho, Oregon, Montana, Nevada, New Mexico, Utah, and Wyoming.

The following acts are prohibited on the lands of the United States in said grazing districts under the jurisdiction of the Division of Grazing of the Department of the Interior:

1. The grazing upon or driving across any public lands within said grazing districts of any livestock without a license.

2. Grazing upon or driving across said grazing district lands of any livestock in violation of the terms of a license.

3. Allowing stock to drift and graze on said district lands without a license.

4. Constructing or maintaining any kind of works, structure, fence, or inclosure without authority of law or license.

5. Destroying, molesting, disturbing, or injuring property used, or acquired for use, by the United States in the administration of grazing districts.

The following rules for fair range practice will be complied with by all licensees within said grazing districts:

1. All licenses will comply with the laws of the State within which the grazing district is located in regard to the number and kind of bulls turned on the range.

2. Crossing licensees shall follow the route prescribed in the crossing license, at a rate of not less than five (5) miles per

day for sheep or goats and ten (10) miles per day for cattle and horses.

Procedure for Enforcement of Penalties for Violation of the Rules and Regulations

Section 2 of the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act, provides that "any wilful violation of the provisions of this act" or of "rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

* * * * *

The foregoing rules for administration of grazing districts shall be effective immediately as to all grazing districts now established and to all new grazing districts when established and they supersede Division of Grazing Circulars Nos. 1, 2, 4, and 6 heretofore issued.

F. R. CARPENTER,
Director of Grazing.

Approved March 2, 1936.

HAROLD L. ICKES,
Secretary of the Interior.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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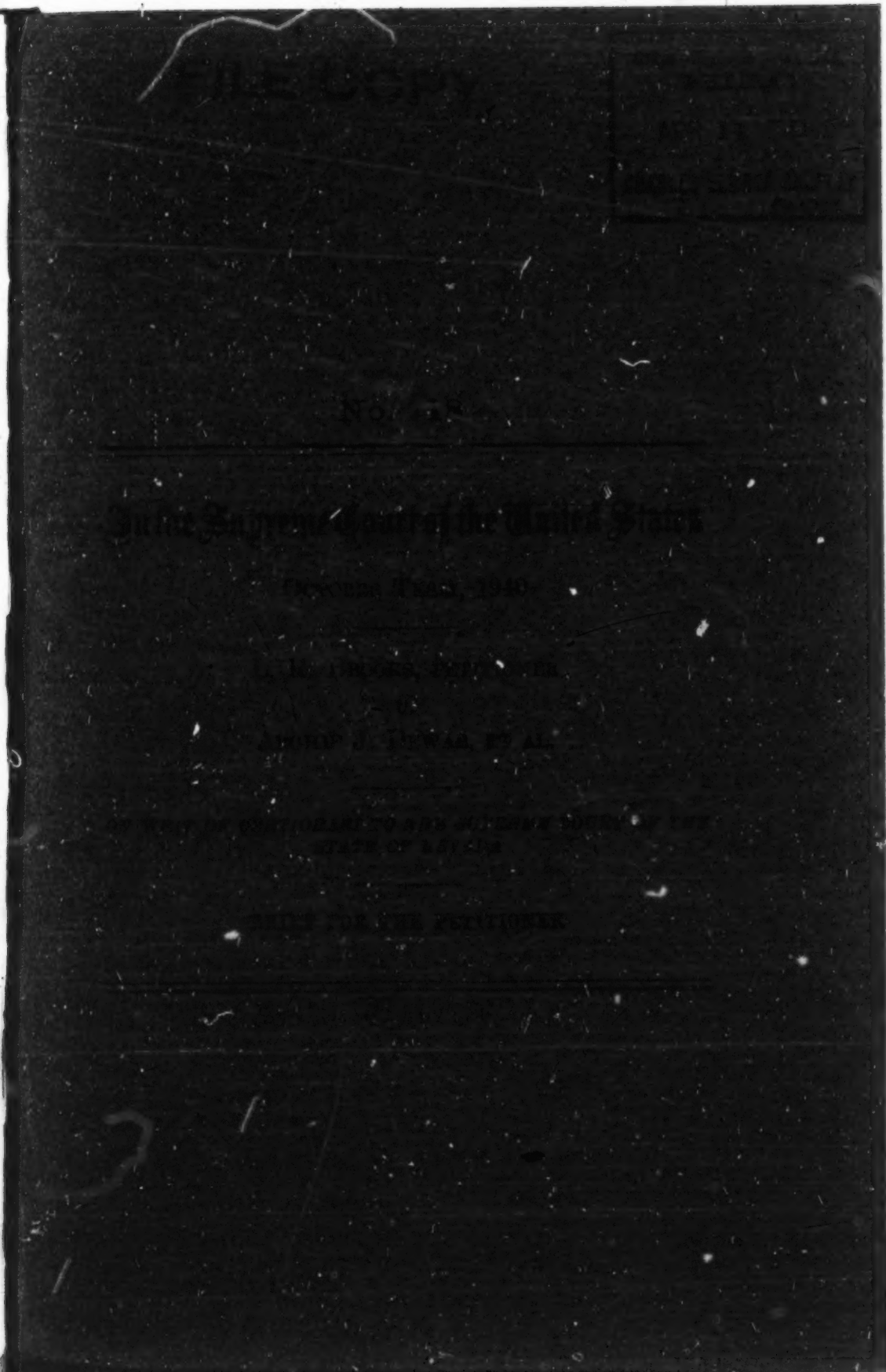

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In the Supreme Court of the United States

OCTOBER TERM, 1940

No. 718

L. R. BROOKS, PETITIONER

v.

ARCHIE J. DEWAR, ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF NEVADA

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (R. 42–57) is reported in 106 P. 2d 755. The district court did not write an opinion.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on October 24, 1940 (R. 57–58). The petition for a writ of certiorari was filed on January 24, 1941, and was granted on March 10, 1941. The jurisdiction of this Court rests on Section

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237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED[1]

The Secretary of the Interior, pending the collection of data necessary for the issuance of grazing permits under Section 3 of the Taylor Grazing Act, prescribed regulations requiring temporary grazing licenses, to be issued for a low uniform fee. Respondents brought suit to enjoin the Regional Grazier from enforcing this regulation and from barring their livestock from the public range. The questions are:

1. Whether the suit is brought against the United States.

2. Whether the Secretary of the Interior is an indispensable party.

3. Whether the state courts have jurisdiction to enjoin the actions of a federal official.

4. Whether the Secretary of the Interior under Section 2 of the Taylor Grazing Act has authority to require the temporary licenses and to charge the fee.

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269 (R. 15–23), as amended by the Act of June 26, 1936, c. 842,

[1] The questions vary from the form used in the petition, and conform to the arrangement of this brief. It is believed there has been no change of substance except for the addition of the third question (see n. 46, p. 35, *infra*).

49 Stat. 1976, and of the regulations of the Secretary of the Interior issued thereunder (R. 23–27), are printed in the Appendix.

STATEMENT

Prior to 1934 settlers in the West enjoyed an implied and unrestricted license to graze livestock on the public domain free of charge. *Buford* v. *Houtz,* 133 U. S. 320, 326. This unregulated use of the public lands of the United States resulted in numerous abuses [2] which led to the adoption of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, 43 U. S. C., Secs. 315 *et seq.,* an Act designed, as its title indicates, "To stop injury to the public grazing lands by preventing overgrazing and soil deterioration, to provide for their orderly use, improvement, and development, [and] to stabilize the livestock industry dependent upon the public range".

This Act is a comprehensive statute, requiring the Secretary of the Interior to ascertain which public lands (out of a total of 173,000,000 acres in the western states) [3] are "chiefly valuable for grazing and raising forage crops" and from such lands to designate grazing districts embracing not to ex-

[2] H. Rept. No. 903, 73d Cong., 2d Sess. (1934); Sen. Rept. No. 1182, 73d Cong., 2d Sess. (1934); 78 Cong. Rec., pt. 6, p. 6358 (1934); *ibid.*, pt. 10, p. 11139.

[3] Hearings, H. Committee on Public Lands, H. R. 2835, 73d Cong., 1st Sess., and H. R. 6462, 73d Cong., 2d Sess. (1934), pp. 6, 7, 18.

ceed 142,000,000 acres.[4] Once these districts are established, the Secretary is directed, by Section 2, to "make provision for the protection, administration, regulation, and improvement of such grazing districts" and to "do any and all things necessary to accomplish the purposes of this Act." In carrying out the Act the Secretary is authorized, under Section 3, to issue term permits "to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time." In issuing these permits preference is to be given "to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water, or water rights owned, occupied, or leased by them." All permits are to be renewed if their denial will "impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan."

After establishing the grazing districts contemplated by the Act, and pending the collection of information prerequisite to the issuance of the term permits authorized by Section 3, the Secretary of the Interior, acting under Section 2, promulgated

[4] Amendatory Act of June 26, 1936, c. 842, 49 Stat. 1976.

regulations setting up a system of temporary licenses and uniform fees. This system was not to be permanent. The regulations provide (R. 23):

> Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.[5]
>
> During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Believing that the Secretary lacked authority to issue temporary licenses, as distinguished from term permits, and to charge uniform fees therefor, some forty persons who are engaged in the business of grazing livestock in Nevada, instituted the present suit in the state court against L. R. Brooks, the Acting Regional Grazier of the United States for Region Three, to enjoin him from enforcing the licensing and fee provisions prescribed by the Secretary's regulations of March 2, 1936. The complaint alleges that the Act gives the Secretary no authority to require temporary, revocable licenses, that the Secretary has no authority to charge fees for such licenses, and that the grazing fees required

[5] Cf. 43 Code of Federal Regulations, sec. 501.1 (c).

by the regulations were fixed without any attempt to determine what would be a reasonable fee in each case (R. 8–9). Brooks demurred on the grounds (1) that the complaint does not state a cause of action; (2) that the suit is one against the United States to which it has not consented; and (3) that the Secretary of the Interior is an indispensable party and has not been joined (R. 31).[6]

The demurrer was overruled and, upon Brooks' failure to answer further, judgment was entered enjoining him "from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range" in Nevada "in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license" prescribed by the departmental rules and regulations (R. 35). The Supreme Court of Nevada affirmed (R. 57). It held that the suit was not one against the United States, and that the Secretary was not an indispensable party (R. 50). After expressly refusing to decide whether Section 2 of the Taylor Grazing Act authorizes the issuance of temporary licenses or the charging of grazing fees (R. 56), the court held that in any event fees could not "legally be based

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[6] Prior to the filing of this demurrer, the Government tried without success to remove the case to the federal courts (*Dewar* v. *Brooks*, 16 F. Supp. 636) and to enjoin further proceedings in the state courts (*United States* v. *Dewar*, 18 F. Supp. 981).

upon the uniform rate prescribed by the Rules of March 2, 1936" (R. 57).

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of Nevada erred:

1. In holding that the United States is not an indispensable party to a suit brought by stockmen in Nevada to enjoin the Regional Grazier from requiring them to obtain temporary licenses in order to graze their livestock on the public range in that state.

2. In holding that the Secretary of the Interior is not an indispensable party to a suit brought to enjoin his subordinate from enforcing departmental rules and regulations promulgated by the Secretary himself.

3. In affirming a decree which enjoined the Regional Grazier from enforcing the rules and regulations of the Department of the Interior, and from barring the livestock of the respondents from the public lands of the United States unless they complied with those rules and regulations.

4. In holding that the Secretary of the Interior, pending the collection of necessary data for the issuance of term permits, lacks authority under the Taylor Grazing Act to charge a low uniform fee for temporary licenses issued to persons grazing livestock on public lands within grazing districts established under that Act.

SUMMARY OF ARGUMENT

I

The Nevada state courts were without power in this case to determine the validity of the Grazing Rules of March 2, 1936.

A. The suit was brought against the United States, which has not consented to be sued. The complaint did not seek to defend respondents' property rights against wrongful invasion, but sought only to secure free access for their livestock to the public lands of the United States. The prayer and the effect of the decree was to afford relief against the United States, and the suit therefore must fail. (1) The complaint sought to interfere with the Government's possession and use of its property. (2) It attempted to interfere with the functions of the Government, in the administration of its public lands. (3) It was brought against the petitioner only in his official capacity. (4) While the decisions of this Court are far from consistent, the respondents can bring their case within none of the exceptions which have been introduced into the foregoing rules.

B. The Secretary of the Interior is an indispensable party and has not been joined. (1) The question seems plainly to be one of federal rather than state law, since upon its determination rests the manner in which the functions of the Department of the Interior may be enjoined and the nature and extent of the officer's liabilities. (2) It is not so

clear, if the suit is not laid against the United States, and if the respondents can obtain all they ask by restraint of the local officer, that the Secretary must be joined. The authorities are in conflict. *Gnerich* v. *Rutter*, 265 U. S. 388; *Colorado* v. *Toll*, 268 U. S. 228. The considerations of policy point in both directions. But we think the balance lies fractionally on the side of a ruling that the Secretary is an indispensable party.

C. The state courts of Nevada, in any event, were without power to enjoin the activities of a federal officer. It is settled that state courts have no power to interfere with the functions of the federal courts, to issue writs of habeas corpus to prisoners in federal custody, to issue writs of mandamus to federal officers, or to enjoin the collection of federal taxes. By the same token, they are without power to enjoin a federal officer in the performance of his duties. Jurisdiction is not conferred by the fact that he is alleged to act without authority. *Tarble's Case*, 13 Wall. 397.

II

A. (1) Section 2 of the Taylor Grazing Act, unless limited by Section 3, clearly authorizes the temporary license and fee system established by the Rules of March 2, 1936, because a comparable licensing system based on similar language in the Forest Reserve Act has been upheld by this Court in *United States* v. *Grimaud*, 220 U. S. 506, and in *Light* v. *United States*, 220 U. S. 523.

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(2) The broad grant of authority conferred in mandatory terms by Section 2 is not restricted by the permissive authority to carry out the permit provisions of Section 3. Some temporary system had to be devised to carry out the legislative intent while the necessary data was being assembled on which to base a system of long-term permits authorized by Section 3. A hasty and improper issuance of term permits without adequate information regarding prior use and existing range capacity could have disastrous consequences. If too many were issued, the evils which the Act was designed to remedy, such as overgrazing, soil erosion, and range destruction would be continued and even aggravated. On the other hand, if too few were issued the livestock industry dependent on the public range would be disrupted if not destroyed. Nor could the Secretary properly accomplish the purposes of the Act if he were to make no effort to control grazing until the permanent system was established. The court below should therefore have avoided the construction which forbade the temporary licenses authorized by Section 2 and made the Act unworkable. The construction placed on Sections 2 and 3 of the Taylor Grazing Act by the administrative agency "charged with the responsibility of setting its machinery in motion" is entitled to great weight and should not be lightly disturbed by the courts. *Norwegian Nitrogen Co. v. United States,* 288 U. S. 294, 315.

B. The question whether the Taylor Grazing Act, as originally enacted, authorized the regulations now complained of is largely academic, because Congress in no less than three ways has ratified or approved the system of temporary licenses and uniform fees prescribed by the Rules of March 2, 1936. (1) Congress, knowing that permits were not being issued and that fees were being charged for temporary licenses, has made annual appropriations for range improvements on the basis of such collections. (2) Congress in June of 1936 virtually reenacted the Taylor Grazing Act by extending its provisions to another 62,000,000 acres of the public domain, and thus evidenced approval of the regulations promulgated in the interim. (3) Finally, in the Soldiers' and Sailors' Civil Relief Act of October 17, 1940, Congress provided for the temporary suspension of "permits and licenses" under the Taylor Grazing Act, and thus recognized and approved the hybrid system of licenses and permits now used by the Division of Grazing.

ARGUMENT

I

THE SUIT CANNOT BE MAINTAINED FOR WANT OF JURISDICTION AND OF INDISPENSABLE PARTIES

The Supreme Court of Nevada, as we show below, erroneously held that the Taylor Grazing Act did not authorize the Director of Grazing and the Secretary of Interior to prescribe the uniform

fees provided in the Grazing Rules of March 2, 1936. But the Court is also faced with serious questions as to the right of the Nevada courts to entertain this action. We urge (a) that there was no jurisdiction, because the suit is in fact against the United States, (b) that the suit perhaps should be dismissed because the Secretary of the Interior is an indispensable party, and (c) that the state courts are without power to enjoin the official acts of a federal officer.

A. THE SUIT IS AGAINST THE UNITED STATES WHICH HAS NOT CONSENTED TO BE SUED

The court below held, without elaboration, that this suit was not one brought against the United States (R. 50). This ruling was error.

None has ever questioned that the United States is immune from a suit to which it has not consented.[7] The exceedingly voluminous litigation, and the not wholly consistent rulings of this Court,[8] have reflected difficulty not in the rule but in its application. See *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9. In this suit, however, we think that the presence of the United States as the real party defendant appears with unmistakable clarity, and the question accord-

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[7] *The Federalist*, No. 81; *Hans* v. *Louisiana*, 134 U. S. 1, 11–19; *Williams* v. *United States*, 289 U. S. 553, 573–577; *Monaco* v. *Mississippi*, 292 U. S. 313, 321–323.

[8] Mr. Justice Miller, more than 50 years ago, noted that "the questions raised have rarely been free from difficulty" and that it is not "an easy matter to reconcile all the decisions of the court in this class of cases." *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 451. His statement applies with redoubled force today.

ingly presents less difficulty than is ordinarily the case.

The complaint filed by respondents in the state court sought to enjoin the petitioner, Acting Regional Grazier of the United States, from enforcing grazing regulations promulgated by the Director of Grazing with the approval of the Secretary of the Interior (R. 2). It prayed that respondents be allowed to graze their livestock on the public range without payment of the license fees required by the Grazing Rules of March 2, 1936, and that the court decree that the Director of Grazing and the Secretary of the Interior had no authority to prescribe in the Rules that the fees be charged (R. 14). The state court entered a perpetual injunction in accord with the prayer (R. 34–35).

The complaint and the decree quite evidently operate in truth against the United States as well as the petitioner. It is immaterial that the United States is not named as a party defendant.[9] And it

[9] Early decisions held that this might be the only question. *Osborn* v. *United States Bank*, 9 Wheat. 738, 858–859; *Davis* v. *Gray*, 16 Wall. 203, 220. But the rule has since been settled that the absence of the Government as a formal party defendant is immaterial if the suit is in reality directed against the sovereign. *Louisiana* v. *Jumel*, 107 U. S. 711; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446; *Poindexter* v. *Greenhow*, 114 U. S. 270, 287; *Hagood* v. *Southern*, 117 U. S. 52, 67; *In re Ayers*, 123 U. S. 443, 487–492; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Oregon* v. *Hitchcock*, 202 U. S. 60, 68–69; *Louisiana* v. *McAdoo*, 234 U. S. 627, 629; *Ex parte State of New York, No. 1*, 256 U. S. 490, 500; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 296.

is not controlling that the petitioner was alleged to be acting without authority in the statute.[10] It is, instead, well settled that whether the suit is against the United States is determined by the effect of the decree.[11] It seems necessarily to follow that the respondent's complaint is in reality directed against the Government itself, because (1) it seeks to interfere with the possession and use of Government property, (2) it interferes with the functions of the Government, (3) it is brought against the petitioner only in his official capacity, and (4) it does not fall within any of the exceptions to the general rule of sovereign immunity from suit.

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[10] Without such an allegation, of course, there could be no question of relief against the officer. *Yearsley* v. *Ross Construction Co.*, 309 U. S. 18, 21; *Hurley* v. *Kincaid*, 285 U. S. 95, 104; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 297; *Crozier* v. *Krupp*, 224 U. S. 290. But it has long been settled that a suit against the Government cannot be entertained through the expedient of suing the officer and alleging that he acts without proper authority. *Cramp & Sons* v. *Curtis Turbine Co.*, 246 U. S. 28, 40. In the following decisions, for example, the Court held the suit to be against the Government, although it was alleged that the officer's conduct was without authority in the constitution or the statute: *Louisiana* v. *Jumel*, 107 U. S. 711, 720–723; *Hagood* v. *Southern*, 117 U. S. 52, 67–68; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69–70; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475; *Louisiana* v. *Garfield*, 211 U. S. 70, 77–78; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222; *Louisiana* v. *McAdoo*, 234 U. S. 627, 632–634; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 476; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Morrison* v. *Work*, 266 U. S. 481, 485–488.

[11] *Minnesota* v. *Hitchcock*, 185 U. S. 373, 386; *Louisiana* v. *McAdoo*, 234 U. S. 627; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 296.

1. *The Complaint Seeks to Interfere With the Government's Possession and Use of Its Property.*—By their complaint the respondents sought, without the payment of the prescribed fees, to use the public lands of the United States to satisfy their grazing requirements (R. 3). They sought, not to protect their property from invasion by the Government, but to avoid liability for trespassing on the property of the United States (R. 8). They prayed that the petitioner "be perpetually enjoined from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range" (R. 14). This relief was given them by the judgment (R. 35).

It needs no argument to show that the complaint quite frankly seeks to interfere with the possession and use by the United States of its property. Respondents ask only one thing: free access to the public lands of the United States. The complaint does not allege any right of ownership or possession in the respondents.[12] Even in cases where the United States has only an opposing claim to the property, it has often been ruled that the question may not be resolved by suit against its officer.[13] *A fortiori,*

[12] We show below (pp. 44–45) that the implied grazing license of respondents was terminated in 1934; the complaint makes no categorical claim that the implied license continued after May 31, 1935 (R. 4).

[13] *Carr* v. *United States*, 98 U. S. 433, 438; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Christion* v. *Atlantic & N. C. Railroad*, 133 U. S. 233, 241; *Stanley* v. *Schwalby*, 162 U. S. 255, 270, 283; *Oregon* v. *Hitchcock*, 202 U. S. 60, 70; *Naganab* v. *Hitchcock*, 202 U. S. 473, 476; *Louisiana* v. *Garfield*, 211 U. S. 70, 77–78; *Hopkins* v. *Clem-*

when the Government has title to and possession of the property, suit will not lie against its officer to control its disposition,[14] to direct its administration,[15] or to forbid its use.[16] This case represents a still more extreme demand, for the respondents seek by court injunction against the official to obtain use for themselves of Government property. As the Court said in *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222, "The United States is the owner in possession * * *. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail."

2. *The Complaint Seeks to Interfere with the Functions of Government.*—The same conclusion results if one adopts an alternative approach. The object of the complaint is to enjoin the enforcement of regulations governing grazing on the public lands (R. 2). It sets out the economic dependence

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son College, 221 U. S. 636, 648–649; *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Ex parte State of New York, No. 2*, 256 U. S. 503, 510–511; *Morrison* v. *Work*, 266 U. S. 481, 485; *Leather* v. *White*, 266 U. S. 592; *Work* v. *Louisiana*, 269 U. S. 250, 260–261.

[14] *Oregon* v. *Hitchcock*, 202 U. S. 60, 70; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 476; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222.

[15] *Louisiana* v. *Jumel*, 107 U. S. 711, 722; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475; *Morrison* v. *Work*, 266 U. S. 481, 485–486, 488.

[16] *Belknap* v. *Schild*, 161 U. S. 10, 18, 25; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 605–606; see *James* v. *Campbell*, 104 U. S. 356, 358–359; *Hollister* v. *Benedict Mfg. Co.*, 113 U. S. 59, 67–68.

of the livestock raisers upon the public lands (R. 3–5), the prior practice of unlicensed use and of temporary, costless licenses for the use of the public lands (R. 5–6), and the conferences as a result of which the Department of the Interior decided to charge the uniform minimum fees here attacked (R. 6–7, 9). The prayer for relief seeks free access for respondents' livestock to the public grazing lands of the United States (R. 14). Quite evidently, the respondents seek through their suit to control the regulations which the Government prescribes for the use of Government property.

It is settled that the courts have no power by decrees against the officer to control the manner in which the Government is to perform its functions or administer its property.[17] The courts may not "take upon themselves the administration of the land grants of the United States." *Oregon* v. *Hitchcock*, 202 U. S. 60, 70. For "To interfere with its management and disposition of the lands * * * would interfere with the performance of governmental functions and vitally affect interests of the United States. It is, therefore, an indis-

[17] *Louisiana* v. *Jumel*, 107 U. S. 711, 722; *North Carolina* v. *Temple*, 134 U. S. 22, 30; *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, 232; *In re Ayers*, 123 U. S. 443, 502–506; *Belknap* v. *Schild*, 161 U. S. 10, 18; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 605–606; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475; *Goldberg* v. *Daniels*, 231 U. S. 218, 221–222; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 476.

pensable party to this suit." *Morrison* v. *Work*, 266 U. S. 481, 485–486.[18]

3. *The Suit Is Brought Against Petitioner in His Official Capacity.*—A third way to express the fact that this suit is in reality brought against the United States is to note that the complaint was filed against the petitioner only in his official capacity.

The complaint, it is true, is sedulously silent on the capacity in which it impleads the petitioner. It mentions neither a personal nor an official capacity, and it prays no relief against his successors. But it describes the petitioner as "Acting Regional Grazier of the United States for Region Three" (R. 2). It nowhere mentions any individual interest petitioner might have in excluding respondents' livestock from the range. Petitioner's threatened offense is simply the enforcement of the Grazing Rules (R. 2, 10, 11, 13, 14). The lengthy recitals of the complaint are all directed at the action of the Director of Grazing, approved by the Secretary (R. 5–10). The petitioner, too obviously for argument,

[18] In *Louisiana* v. *McAdoo*, 234 U. S. 627, the State sought to enjoin the Secretary of Treasury from collecting a duty on imported sugar which under the tariff acts was too low. The Court denied leave to file the bill, on grounds equally applicable here. It said (p. 632): "Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the Tariff Acts would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. Such suits would obviously, in effect, be suits against the United States."

is sued only in his official capacity. Many decisions of this Court have found evidence that the suit was against the Government in the fact that the officer had no personal interest and was sued only in his official capacity.[19] The present case falls within the same rule.

4. *This Case Comes Within None of the Exceptions to the General Rule.*—The analysis we have presented shows, with unmistakable clarity, that this suit is in truth directed at the United States. We have, however, no hesitation in confessing that it presents the state of the law with misleading simplicity. The decisions of this Court are, we believe, entirely beyond reconciliation in many aspects of the recurrent problem whether a suit is brought against the Government.[20] But, whatever the ultimate need of clarification, this case does not seem to

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[19] *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 123–124; *Louisiana* v. *Jumel*, 107 U. S. 711, 720; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Hagood* v. *Southern*, 117 U. S. 52, 69; *In re Ayers*, 123 U. S. 443, 489, 493; *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, 232; *Belknap* v. *Schild*, 161 U. S. 10, 25; *Smith* v. *Reeves*, 178 U. S. 436, 439; *Minnesota* v. *Hitchcock*, 185 U. S. 373, 387; *Wells* v. *Roper*, 246 U. S. 335, 337; *Ex parte State of New York, No. 1*, 256 U. S. 490, 501; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 605; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69; *Naganab* v. *Hitchcock*, 202 U. S. 473, 475.

[20] The contrariety of decision seems to reflect the volume of litigation, combined with, on the one hand, the clarity of the general rule of immunity, and, on the other hand, the undoubtedly harsh consequences of ruling that the citizen is remediless against distasteful acts of his Government.

afford an occasion for choice among the alternative rules which frequently may be invoked to determine whether or not a suit is directed at the Government. For it is covered by none of the exceptions which from time to time have been introduced into the general rule that the United States may not be impleaded by suit against its officer.

The cases in which a suit against the government officer have been allowed fall into several reasonably well-defined categories.[21] Where the plaintiff has admitted title to and possession of the property, he has been allowed to resist its wrongful invasion by a government officer.[22] These cases have been ex-

[21] *Northern Pac. Ry. Co.* v. *North Dakota*, 250 U. S. 135, 151–152, and *Dakota Cent. Tel. Co.* v. *South Dakota*, 250 U. S. 163, on the face of the opinions would present difficulty if they were to be fitted into the the following classification. But Section 10 of the Federal Control Act (c. 25, 40 Stat. 451), other parts of which are quoted by Chief Justice White (250 U. S. at 146) expressly provides that "no defense shall be made * * * upon the ground that the carrier is an instrumentality or agency of the Federal Government."

[22] Damages: *The Flying Fish*, 2 Cranch. 170, 178–179; *Scott* v. *Donald*, 165 U. S. 58, 67–70; *Hopkins* v. *Clemson College*, 221 U. S. 636, 643–644. Injunction: *In re Tyler, Petitioner*, 149 U. S. 164, 190; *Allen* v. *Baltimore & Ohio Railroad Company*, 114 U. S. 311, 314–317; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 110; *Philadelphia Co.* v. *Stimson*, 223 U. S. 605, 619–620.

Colorado v. *Toll*, 268 U. S. 228, is properly classified under this head. The Court allowed a bill to enjoin the Superintendent of the Rocky Mountain Park from enforcing a regulation forbidding the carriage of passengers for hire except by the Park concessionaire. But the roads had been built by the State and its counties, before the Park was laid out, under R. S. Section 2477, which granted "The right of way

tended to permit the plaintiff to challenge the officer's right of possession of property claimed by the plaintiff.[23] And an individual may restrain unwarranted interference with his rights of property which have advanced almost to the point of a fee title, and where none but he could claim an equitable interest in the property, although it remains in the possession of the Government.[24] Correlatively, the plaintiff has been allowed to recover back his property which is held by the officer separate from the

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for the construction of highways over public lands." The State alleged (No. 234, October Term, 1924; R. 3) jurisdiction over and the right to use the roads, and argued that its ownership and control of the highways (Br. 21–28) brought it within the cases permitting defense against a wrongful invasion of property (Br. 17–20). The Government did not urge that the suit was laid against the United States (cf. Br. 12–14).

[23] *Cammeyer* v. *Newton*, 94 U. S. 225, 234; *United States* v. *Lee*, 106 U. S. 196, 209–223; *Stanley* v. *Schwalby*, 162 U. S. 255, 283; *Tindal* v. *Wesley*, 167 U. S. 204, 211–222; *Scranton* v. *Wheeler*, 179 U. S. 141, 152–153; cf. *Wells* v. *Nickles*, 104 U. S. 444, 446–447. As explicitly pointed out in the *Lee* (106 U. S. at 222), *Stanley* (162 U. S. at 271–272), *Tindal* (167 U. S. at 223–224) and *Scranton* (179 U. S. at 152) cases, the judgment cannot conclude the title of the Government. *Carr* v. *United States*, 98 U. S. 433, 439; *Hussey* v. *United States*, 222 U. S. 88, 93.

[24] *Garfield* v. *Goldsby*, 211 U. S. 249, 260–261; *Payne* v. *Central Pac. Ry. Co.*, 255 U. S. 228, 234–237, 238; *Payne* v. *New Mexico*, 255 U. S. 367; *Santa Fe Pac. R. R. Co.* v. *Fall*, 259 U. S. 197, 198–199. The Secretary of the Interior, in *Santa Fe Pac. R. R. Co.* v. *Lane*, 244 U. S. 492, 497–498, did not resist the plaintiff's title but his insistence upon excessive surveying fees yet prevented the plaintiff's rights from ripening into possession and fee.

property or funds of the Government,[25] or to enjoin its disposition by the Government in a manner which would defeat his rights.[26] There has been held to be a corresponding power to resist the wrongful invasion of the plaintiff's personal rights.[27] A plain, ministerial duty to act in accordance with the statute may be compelled.[28] And in a good number of cases the plaintiff has been allowed by injunction suit against the officer to challenge the validity of regulatory statutes or regulations,[29] in the outcome of which the Government can have no interest if the command be invalid.[30]

[25] *The Flying Fish*, 2 Cranch. 170, 178–179; *United States* v. *Peters*, 5 Cranch. 115, 139–140; *Osborn* v. *United States Bank*, 9 Wheat. 738, 858–859; *Davis* v. *Gray*, 16 Wall. 203, 220–221; *Poindexter* v. *Greenhow*, 114 U. S. 270, 287–297.

[26] *Pennoyer* v. *McConnaughy*, 140 U. S. 1, 9–18; *Noble* v. *Union River Logging Railroad*, 147 U. S. 165, 171–172; *Lane* v. *Watts*, 234 U. S. 525, 540; *Work* v. *Louisiana*, 269 U. S. 250, 254, 261. *Ickes* v. *Fox*, 300 U. S. 82, 93–97, may be placed either in this category or with the cases listed in note 23, *supra*.

[27] *Wilkes* v. *Dinsman*, 7 How. 89, 123, 130; *Truax* v. *Raich*, 239 U. S. 33, 37–38.

[28] *Board of Liquidation* v. *McComb*, 92 U. S. 531, 541; *Parish* v. *MacVeagh*, 214 U. S. 124; *Houston* v. *Ormes*, 252 U. S. 469, 472–473; compare *Ness* v. *Fisher*, 223 U. S. 683, 691–694.

[29] See e. g., *Ex parte Young*, 209 U. S. 123, 151–152, 159–160; *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94, 108–111; *Truax* v. *Raich*, 239 U. S. 33, 37; *Pierce* v. *Society of Sisters*, 268 U. S. 510.

[30] Compare the contrasting situation in which the Government has a proprietary interest which will be protected whatever the validity of the regulation. *United States* v. *Kapp*, 302 U. S. 214, 217–218; *Kay* v. *United States*, 303 U. S. 1, 6–7.

It is unnecessary to attempt to reconcile the rationale of these cases with those earlier discussed, or to enter into the difficult task of calibrating the current vitality of each line of cases. For the respondents come within none of the situations in which a suit against the Government officer has sometimes been allowed. They neither have nor claim title to or possession of the public lands to which they seek free access; there is no invasion of their personal rights; and the object of the Taylor Grazing Act is not to regulate the respondents' conduct of their livestock business but to protect the lands of the Government. The respondents, in other words, have no legal right which under any rule is sufficient to warrant enjoining the officer to give protection against the Government's use of its property. *Tennessee Power Co.* v. *Tennessee Valley Authority,* 306 U. S. 118, 137. It follows that, even under the most lenient decision of this Court, the courts below have no power to resolve the respondents' controversy with the Government by issuing process against its officer.

B. THE SECRETARY OF THE INTERIOR IS AN INDISPENSABLE PARTY AND HAS NOT BEEN JOINED

The Supreme Court of Nevada ruled, without discussion, that the Secretary of the Interior was not an indispensable party defendant (R. 50). Respondents support this decision and urge (Br. in Opp. 9–12) in addition, that the question is one of state law. If the suit be held not to be brought

against the United States, we are not entirely clear that it is necessary in this case to join the Secretary of the Interior. But it seems evident that the question in any case is one of federal and not of state law.

1. *The Question is One of Federal Law.*— Whether or not the Secretary of the Interior is a necessary party to this action is a question (a) relating to the organization of the federal government, and (b) one which the Nevada court decided on the basis of federal, not state, law.

(a) As we have shown, the complaint asked and the judgment awarded relief against the Regional Grazier, the effect of which was to give respondents' livestock free access to the public range. The petitioner has been enjoined from enforcing regulations prescribed by the Director of Grazing with the approval of the Secretary of the Interior. Whether the subordinate official of the United States can be held to answer for regulations prescribed by his officials, and whether the operation of federal laws and regulations can be avoided by suit against the subordinate official who is in the locality, are questions which reach deeply into the organization of the federal government.

Specifically, the question as to the necessity of joining the Secretary of the Interior involves or may involve the following issues, which plainly are questions of substance not procedure, and which

plainly are matters of federal law. Whether the direction of the Secretary overrides a state court injunction; whether the petitioner has authority to disregard the Secretary's order if he views it as invalid; whether the petitioner's duties as a federal official involve an individual liability; whether the functions of the Department of the Interior may be halted by process against a local officer; and whether the Secretary would be justified in directing some official other than petitioner, against whom alone the injunction operates, to exclude respondents' livestock from the public range.[31]

This Court has held that the allowance of interest upon claims which are based on federal statutes is governed by federal law. *Board of Commissioners* v. *United States,* 308 U. S. 343, 349–350. The consequences of transactions condemned by federal statutes are questions of federal law. *Dietrick* v. *Greaney,* 309 U. S. 190, 200–201; *A. C. Frost & Co.* v. *Coeur D'Alene Mines Corp.,* No. 78, this Term; see *Avotin* v. *Atlas Exchange National*

[31] It may well be that questions of local law are also involved. Whether adequate relief can be given in the absence of the Secretary, and the strictness with which the Nevada courts enforce the requirement that interested parties be before it, are doubtless matters of state practice. And, even if the Secretary were not an indispensable party under the federal rule, these state requirements would have to be satisfied. The error of the respondents (Br. in Opp. 11) is in supposing that these are the only issues involved.

Bank, 295 U. S. 209. Whether a private person may sue on a postmaster's bond is a question of federal law. *United States* v. *National Surety Corp.,* 309 U. S. 165, 169. These decisions are illustrative of the cardinal principle that transactions or controversies which find their roots in federal statutes or regulations are governed in their entirety by federal law. See Notes, 41 Col. L. R. 125; 54 Harv. L. R. 141. They apply *a fortiori* here, where the basic question relates to the organization of a great executive department of the United States, the liabilities and responsibilities of a federal official, and the means by which an activity of the United States may be halted through judicial action.

Respondents do not argue that it is a question of state law whether or not the United States is an indispensable party. We see no room for a different rule when the question is whether the Secretary of the Interior is an indispensable party.

(b) The Supreme Court of Nevada did not share respondents' belief that it was faced with a question of local law. It did not rely upon local statutes or decisions. It attempted instead to apply what it believed was the federal law. This is evidenced by its reliance (R. 50) on *Colorado* v. *Toll,* 268 U. S. 228, and 28 Am. Jur. 453, § 276, n. 12 (which in turn cites *Colorado* v. *Toll* and *Work* v. *Louisiana,* 269 U. S. 250). Hence, the decision below cannot be construed as a definitive adjudica-

tion of Nevada law, but is simply an effort to apply federal law.[32]

2. *The Secretary Is An Indispensable Party.*—It is clear, then, that whether or not the Secretary of Interior is an indispensable party to the maintenance of this suit is a question of federal law. We are not so clear that federal law, in the circumstances of this case, requires his joinder if the suit were held not to be one against the United States.

There seems on principle to be only one clear situation in which the suit might properly be brought against the superior officer but not against his subordinate alone. That is where the bill is not laid against the Government but yet seeks relief which cannot be secured through compulsion of the subordinate alone.

But where the plaintiff can obtain all he wants by control of the subordinate, every reason which points to the necessity of joining the superior officer points equally to the conclusion that the Court is in any event without jurisdiction because the suit is against the United States. It seems, for example, obviously inappropriate in this case to test the validity of the Secretary's regulations by impleading the Acting Regional Grazier for Region Three.

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[32] Even, then, if the question were one of state rather than federal law, this Court would not be bound by the ruling of the Nevada court if the decision were the result of a misreading of the federal rulings. *Tipton* v. *Atchison, Topeka & Santa Fe Ry. Co.*, 298 U. S. 141, 152; *Red Cross Line* v. *Atlantic Fruit Co.*, 264 U. S. 109, 120; see *Breisch* v. *Central Railroad of N. J.*, No. 384, this Term.

The effect of the suit upon the public lands of the United States, the interference with the functions of the Department of the Interior, and the absence of any interest of his own make the petitioner an anomalous defendant in this action. But if the Secretary for these reasons is a more appropriate defendant, by the same token the suit is one against the United States.[33]

The doctrine that a superior officer must be made a party to the suit against his subordinate originated and has generally been applied in circumstances where the subordinate had neither authority nor capacity to grant the relief prayed. The rule first appeared in *Vernon* v. *Blackerby,* 2 Atk. 144 (Ch. 1740), in which Lord Hardwicke dismissed as preposterous a bill against a minor official praying that he distribute funds which Parliament had placed in the control of his superiors. In this country the doctrine was first applied in *Warner Valley Stock Co.* v. *Smith,* 165 U. S. 28, where the bill sought both the issuance of a land patent and an injunction against further trespasses of government officials. In both these cases affirmative relief was requested which could not have been given without the active concurrence of the superior officer.

[33] Analytically, one may suppose that a suit might be considered to be an interference with the functions of government almost but not quite sufficient to be held a suit against the United States. In such a situation, considerations of propriety would suggest the necessity of the Secretary as a party defendant. But as a practical matter, any such rule would serve only to increase the extremely confused state of the law.

During the next quarter of a century these cases were not construed as casting any doubt on the propriety of seeking negative relief, which could be obtained from the subordinate official alone, without the joinder of his superior.[24] But in 1924 this Court went one step further and laid down the general doctrine that the superior officer must be made a party defendant and given an opportunity to defend his direction and regulations. "He is the public's real representative in the matter, and, if the injunction were granted, his are the hands which would be tied." *Gnerich* v. *Rutter*, 265 U. S. 388, 391. The *Gnerich* case was reaffirmed in *Webster* v. *Fall*, 266 U. S. 507, where this Court disposed of earlier decisions in which relief had been granted against a subordinate without the joinder of his superior by stating that it was not bound by decisions upon questions which merely lurked in the record and which were not called to its attention. The general language of the *Gnerich* case, coupled with the dismissal in the *Webster* case of decisions where the question had been passed over *sub silentio*, seemed to lay down a general rule requiring the joinder of the superior in all suits where administrative rules and regulations were challenged.

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[24] See, e. g., *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94; *Public Clearing House* v. *Coyne*, 194 U. S. 497; *Swigart* v. *Baker*, 229 U. S. 187; *Missouri* v. *Holland*, 252 U. S. 416; *Leach* v. *Carlile*, 258 U. S. 138; *Hill* v. *Wallace*, 259 U. S. 44.

But five months later the whole doctrine was thrown into confusion by the opinion in *Colorado* v. *Toll*, 268 U. S. 228, holding that the state could obtain injunctive relief against a federal park official without joining the superior officer. The *Warner Valley*, *Gnerich*, and *Webster* cases, although cited in the Government's brief, went unmentioned in the short opinion written by Mr. Justice Holmes. Possibly these several decisions can be reconciled on the ground that in *Colorado* v. *Toll* the quasi-sovereign rights of the state were involved and hence it was deemed appropriate to relax the rule requiring joinder of the superior.[35] Support for this view can be found in the language of the opinion (p. 230) and in the fact that *Missouri* v. *Holland*, 252 U. S. 416, 431, was the only case cited on the point. See *National Conference on Legalizing Lotteries, Inc.* v. *Goldman*, 85 F. (2d) 66 (C. C. A. 2d); *Carr* v. *Desjardines*, 16 F. Supp. 346, 349 (W. D. Okla.)

However this may be, the current state of the law is in an extremely confused condition so far as

[35] The cases can more readily be classified if the doctrine be viewed simply as another facet of the immunity of the Government from suit. In neither the *Gnerich* nor the *Webster* case was the plaintiff resisting invasion of property in his possession, while the State in the *Toll* case had property and jurisdictional rights in the roads through the park (note 22, supra, *pp.* 20–21). This, of course, is not a "reconciliation" of the cases but simply an adoption of the unrationalized distinctions found in the field of suits against the Government.

concerns suits to enjoin subordinate officers from acting under direction of their superiors.[36] It is the belief of the Fifth Circuit, and apparently of the court below, that *Colorado* v. *Toll* overrules the doctrine laid down in the *Gnerich* case.[37] The Second, Third, and perhaps the Tenth Circuits have decided otherwise.[38] The Ninth Circuit, and perhaps the Fourth Circuit, appear to follow the *Gnerich* decision in cases where the superior's discretion is attacked,[39] and *Colorado* v. *Toll* where a

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[36] It is clear, both under the authorities and on principle, that the superior must be joined in those cases where affirmative relief is sought and where the performance of the duty in question involves action or an exercise of discretion which can be done only by the superior. See *Vernon* v. *Blackerby*, 2 Atk. 144 (Ch. 1740); *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28; *Webster* v. *Fall*, 266 U. S. 507. The difficulty relates to the cases, such as this, where the plaintiff can obtain the relief he asks by compulsion of the subordinate alone.

[37] *Rood* v. *Goodman*, 83 F. (2d) 28 (C. C. A. 5th); *Ryan* v. *Amazon Petroleum Corporation*, 71 F. (2d) 1 (C. C. A. 5th), reversed on other grounds, 293 U. S. 388; *Yarnell* v. *Hillsborough Packing Co.*, 70 F. (2d) 435 (C. C. A. 5th); cf. *Janes* v. *Lake Wales Citrus Growers Ass'n*, 110 F. (2d) 653 (C. C. A. 5th).

[38] *National Conference on Legalizing Lotteries, Inc.* v. *Goldman*, 85 F. (2d) 66 (C. C. A. 2d); *Alcohol Warehouse Corporation* v. *Canfield*, 11 F. (2d) 214 (C. C. A. 2d); *Chamberlain* v. *Lembeck*, 18 F. (2d) 408 (C. C. A. 3d); *Jump* v. *Ellis*, 100 F. (2d) 130, 135 (C. C. A. 10th), certiorari denied, 306 U. S. 645.

[39] *Moore* v. *Anderson*, 68 F. (2d) 191 (C. C. A. 9th); *Moody* v. *Johnston*, 66 F. (2d) 999 (C. C. A. 9th); *Appalachian Elec. Power Co.* v. *Smith*, 67 F. (2d) 451 (C. C. A. 4th).

lack of statutory authority is alleged.[40] The district courts show a corresponding variety of decision.[41] The Federal Rules of Civil Procedure contemplate that government officers may be sued, but throw no light on the question whether a subordinate official may be sued without joinder of his superior.[42]

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[40] *Berdie* v. *Kurtz*, 75 F. (2d) 898 (C. C. A. 9th); *Darger* v. *Hill*, 76 F. (2d) 198 (C. C. A. 9th); cf. *Ferris* v. *Wilbur*, 27 F. (2d) 262 (C. C. A. 4th).

[41] Compare, holding the superior to be an indispensable party, *Dami* v. *Canfield*, 5 F. (2d) 533 (S. D. N. Y.); *A. H. Belo Corp.* v. *Street*, 35 F. Supp. 430 (N. D. Tex.); *Redlands Foothill Groves* v. *Jacobs*, 30 F. Supp. 995 (S. D. Cal.); *Carr* v. *Desjardines*, 16 F. Supp. 346 (W. D. Okla.); *Consolidated Gas Co. of New York* v. *Hardy*, 14 F. Supp. 223 (S. D. N. Y.); *Wheeler* v. *Farley*, 7 F. Supp. 433 (S. D. Cal.), with the contrary decisions in *Connecticut Importing Co.* v. *Perkins*, 35 F. Supp. 414 (D. Conn.); *Bailey Gaunce Oil & Refining Co.* v. *Duncan*, 10 F. Supp. 280 (W. D. La.).

[42] Rule 4 (d) (*) provides for service "Upon the United States * * * and in any action attacking the validity of an order of an officer or agency of the United States not made a party, by also sending a copy of the summons and of the complaint by registered mail to such officer or agency." Its requirements are adopted with respect to suits against an officer (though cf. *Moore*, Federal Practice, sec. 4.24, n. 5). Rule 4 (d) (5) provides for service "Upon an officer or agency of the United States, *by serving the United States* and by delivering a copy of the summons and of the complaint to such officer or agency." One might find in these provisions for service a tenuous implication that the subordinate officer might be made to answer for his superior's regulations. But nothing suggests that the Rules intended to enlarge the power otherwise existing to enjoin federal officers. Cf. *United States* v. *Sherwood*, No. 500, this Term. In general, the rules include both the United States and its officers or agencies in the same category. See Rules 12 (a),

The considerations of policy, as to whether the superior officer must be joined when the suit is not one directed at the United States and when the full relief may be obtained by compulsion of the subordinate, seem to point in no certain direction. On the one hand, unless the superior be joined, the subordinate will be under a duty to obey the mandate of the court and at the same time subject to commands which his superior has issued and which the latter is under no legal compulsion to revoke. Note (1937) 50 Harv. L. Rev. 796, 801; (1937) 37 Col. L. Rev. 140, 141; (1940) 26 Va. L. Rev. 370, 371. Joinder also avoids the necessity of a multiplicity of actions throughout the country.[43] A requirement that the superior must be joined will generally assure the Government of a trial in a federal court. Furthermore, if the superior is joined, this will mean that most suits of this nature will have to be brought in the District of Columbia, where they can be more conveniently defended by the Government.[44] On the other hand, the cost of liti-

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13 (d), 24 (c), 54 (d), 55 (e), 62 (e), and 65 (c); cf. Rules 37 (f) and 39 (c). Rule 25 (d) provides for the substitution of successor government officials.

[43] This is a consideration of particular importance in the event there should be litigation so voluminous as seriously to impede, by design or by accident, the Government's litigation functions. Cf. *Landis* v. *North American Co.*, 299 U. S. 248.

[44] Compare the Tucker Act of March 3, 1887, c. 359, 24 Stat. 505, 28 U. S. C. Sec. 41 (20), where Congress has laid down the requirement that all large claims against the United States be filed at the seat of the Government, so as to avoid "attendant dislocation of government business by

gating the validity of an administrative order in the District of Columbia, especially when small sums are involved, may serve virtually to deprive the individual in a distant state of any remedy whatever.[45] Note (1937) 50 Harv. L. Rev. 796, 801; (1937) 37 Col. L. Rev. 140, 142; (1941) 50 Yale L. J. 909, 916–917. It frequently will be easier for the Government to defend the suit in the various judicial districts of the United States through its district attorneys than it is for the private litigant to come to Washington. *Ibid.*

We have, then, an issue in which both the authorities and the considerations of policy point in both directions. It seems important that the operations of the Government not be brought to a halt by suits against its officers (Point A, *supra*); it seems important that, if injunction be available, it be sought in federal rather than state courts (Point C, *infra*). But it does not seem to us to be a matter of particular consequence, if the suit can in fact be brought against the officer rather than the Government, whether the nominal defendant be the

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the appearance of important officers at distant points". *United States* v. *Shaw*, 309 U. S. 495, 502.

[45] See Sec. 50 of the Judicial Code, c. 231, 36 Stat. 1101, 28 U. S. C. Sec. 111, which authorizes the district courts to entertain and adjudicate the rights of the parties who are properly before it, provided the decree does not conclude or prejudice the rights of nonresidents who cannot be served. Cf. Rule 19 (b) of the Federal Rules of Civil Procedure, which contemplate that some absent parties may be indispensable.

superior or the subordinate officer. Nor, in the case where the plaintiff can obtain all he seeks by compulsion of the subordinate alone, does there seem to be any compelling reason of logic or of law why the superior must necessarily be joined. In either case, the real objection is that the Government itself is impleaded.

In the abstract, then, we view it as a matter of comparative indifference whether or not the respondents may proceed against the petitioner without joining the Secretary of the Interior. The true force of this consideration we believe to consist in the emphasis that it gives to the more fundamental propositions that the Government may not be sued through its officer, and that the state courts are without power to enjoin a federal official. But, since this case comes fractionally closer to the *Gnerich* than to the *Toll* case, we submit that the Secretary was an indispensable party, and that the suit must be dismissed.

C. THE STATE COURTS HAD NO JURISDICTION TO ENJOIN A FEDERAL OFFICER

Even if it be held that this is not a suit against the United States, and that the Secretary of the Interior is not a necessary party, there remains a basic objection to the maintenance of this action. The nature of the federal system is such that the courts of a state are without power to enjoin the action of a federal officer.[46] The precise question

[46] This question was not raised in the petition, but since it presents a question of jurisdiction we do not understand that we are foreclosed from arguing it.

seems, curiously enough, never to have been considered by this Court. But we think analogic principles, firmly settled both in the decisions of this Court and in the fundamental relationship between the states and the nation, point to the proper result with considerable clarity.

It has long been settled law that the process of a state court could not issue to interfere with the prosecution of suits in the federal courts or with the execution of judgments of federal courts.[47]

After preliminary uncertainty,[48] this Court settled that both the judicial and the executive branches of the Government were to be protected against interference from state courts, when the interference takes the form of a writ of habeas corpus. *Ableman* v. *Booth,* 21 How. 506; *Tarble's Case,* 13 Wall. 397; see *Robb* v. *Connolly,* 111 U. S. 624, 639; *Ex parte Royall,* 117 U. S. 241, 249. In *Tarble's Case,* the Court explained the reason for the rule (13 Wall. at 409):

> It is manifest that the powers of the National government could not be exercised with energy and efficiency at all times if its acts could be interfered with and controlled for any period by officers or tribunals of another sovereignty.

This policy applies equally, if not *a fortiori,* to the direct interference with federal functions which

[47] *McKim* v. *Voorhies,* 7 Cranch 279; *Freeman* v. *Howe,* 24 How. 450; *Riggs* v. *Johnson County,* 6 Wall. 166; *United States* v. *Council of Keokuk,* 6 Wall. 514.

[48] Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345, 353–357.

arises when the state court issues an injunction against the federal officer. If it is necessary for the Federal Government to have an unrestrained custody of its prisoners, it would seem an equal necessity that its functions be performed without interference by a state court decree.

Issuance of an injunction by a state court against a federal officer would seem also to be a consequence of the settled principle that a state court is without power to issue writs of mandamus to federal officials. *McClung* v. *Silliman,* 6 Wheat. 598; *Ex parte Shockley,* 17 F. (2d) 133 (N. D. Ohio); cf. *Boske* v. *Comingore,* 177 U. S. 459. The writs of mandamus and injunction differ only in form so far as this issue is concerned; each is an undertaking by a state court to control the performance of federal duties.

The Court in *Keely* v. *Sanders,* 99 U. S. 441, made it plain that the principle of the habeas corpus and the mandamus cases would apply equally to injunctions. There the Court declared (99 U. S. at 443):

> No state court could, by injunction or otherwise, prevent Federal officers from collecting Federal taxes. The government of the United States, within its sphere, is independent of State action.

While it is possible to distinguish the *Keely* case upon the traditional reluctance to restrain the collection of federal taxes, its statement is cast in terms of a principle of general application.

The state courts, so far as they have considered this question, seem generally to have ruled that they were without power to control a federal official, whether by writ of mandamus or by injunction. *Brewer* v. *Kidd,* 23 Mich. 440; *Hinkle* v. *Town of Franklin,* 118 W. Va. 585, 191 S. E. 291; *Goldstein* v. *Sommervell,* 170 Misc. 602, 10 N. Y. Supp. (2d) 747; see *Mallory* v. *Wheeler,* 151 Wis. 136, 138 N. W. 97; see also, *In re Turner,* 119 Fed. 231 (C. C., D. C., S. D., Ia).

On authority of the habeas corpus cases, Charles Warren has categorically stated [49] that "It has been conclusively determined that the state courts possess no power to enjoin a federal official * * *." Another commentator [50] has similarly read these cases:

> No state can lawfully do an act which will suspend even for a moment the machinery of the national government * * *. This is fundamental in our duplex system of government, in which the constitution and laws of the United States and treaties made under its authority are the supreme law of the land."

Dicta in the decisions of this Court point to the same result. *Tennessee* v. *Davis,* 100 U. S. 257, 262–263; *In re Neagle,* 135 U. S. 1, 61–62.

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[49] Warren, *Federal and State Court Interference,* 43 Harv. L. Rev. 345, 358.

[50] Bishop, *Judicial Control of Federal Officers,* 9 Col. L. R. 397, 407. See also, *Power of a State Court to Enjoin N. L. R. B. Officials,* 36 Mich. L. Rev. 1344, 1347–1351.

Respondents might argue that this analysis is merely a rephrasing of our position that this suit is in truth directed against the United States. It could be argued that, if the federal official is acting without proper authority, whether in the statute or in the Constitution, he acts only as an individual and not as an official; the conclusion of this argument would be that the federal officer may be brought before a state court upon a prayer for an injunction against him as an individual if only the complaint alleges that he is acting without proper authority. The same contention, however, has been made and has been rejected in the habeas corpus cases. *Tarble's Case,* 13 Wall. 397, 410–411. If allegations of excess authority give to the state courts no power to determine whether or not a writ of habeas corpus should issue, similar allegations should correlatively confer upon the state courts no power to determine whether to issue a writ of injunction.

We have found no case in which a state court has been held, after consideration of this argument, authorized to enjoin a federal official.[51] There are,

[51] In *Stanley* v. *Schwalby*, 162 U. S. 255, the Court ordered an action of trespass to try title, brought in the state courts against army officers, to be dismissed on the merits. And in *Scranton* v. *Wheeler*, 179 U. S. 141, the Court considered on the merits an action of ejectment brought in a state court against the federal officer in charge. In neither case did the Court consider the power of the state courts to entertain these actions, which would be followed by compulsory process akin to the decree of injunction, and in neither case did it affirm the decision on the merits. Again, in *Northern*

it is true, a number of inferences which may be drawn to oppose our argument. (1) The "Force Act," Section 33 of the Judicial Code (28 U. S. C., Sec. 76), confers the right of removal to federal court upon any officer acting under the revenue laws, or any officer of a federal court or of Congress, against whom any suit is brought in a state court for action taken under the authority or color of his office. An implication might be drawn from this legislation that all other federal officers are to be left to defend actions against them in the state courts unless there were some other ground of removal.[52] Cf. *Gay* v. *Ruff*, 292 U. S. 25, 37–38; *Maryland* v. *Soper* (No. 2), 270 U. S. 36, 44. But the statute is primarily concerned with the historic

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Pac. Ry. Co. v. *North Dakota*, 250 U. S. 135, and in *Dakota Cent. Tel. Co.*, v. *South Dakota*, 250 U. S. 163, the Court reversed on the merits mandamus and injunction actions against federally controlled carriers which had been brought in the state courts. These cases, as we have explained (*supra*, n. 21, p. 20) are properly to be explained on the ground of the statutory waiver of immunity.

An early decision, decided long before the habeas corpus cases, held that an action of replevin against property held by a federal officer would lie in a state court. *Slocum* v. *Mayberry*, 2 Wheat. 1. It seems equally applicable to a bill for an injunction, but cannot be considered controlling at this date.

[52] The legislative history of Section 33 and its amendments contain no indication of the Congressional belief as to state court injunction jurisdiction. The 1916 amendment, extending the removal provisions to officers of federal courts (c. 399, 39 Stat. 532), occasioned one report (H. Rept. No. 776, 64th Cong., 1st Sess.) which assumed a jurisdiction in state courts to proceed against federal officers, to be followed by a federal writ of habeas corpus, but was silent as to the power to enjoin.

occasion for the Force Act, criminal prosecutions for the violation of state laws, and with the analogous suit for damages.[53] In neither case is there the direct interference with federal duties which is found in the habeas corpus, the mandamus, and the injunction suits. (2) A corresponding implication might be drawn from the analogous provision for the removal of suits against military officers of the United States. Article 117 of the Articles of War, 10 U. S. C., Sec. 1589. Yet none would suppose that, prior to its enactment in 1920 (41 Stat. 811), a state court could "control the army by writ of injunction." *In re Turner,* 119 Fed. 221, 235 (C. C., S. D., C. D. Ia.) (3) Again, Section 208 of the Judicial Code (28 U. S. C., Sec. 46) gives the district courts exclusive jurisdiction of suits to enjoin the enforcement of orders of the Interstate Commerce Commission. See *Lambert Co.* v. *Baltimore & Ohio R. R. Co.,* 258 U. S. 377; *Venner* v. *Michigan Central R. R. Co.,* 271 U. S. 127. But it is by no means clear whether this precautionary measure reflects a general policy to oust state courts of power to enjoin federal action or an exceptional provision in favor of the Commission.

[53] The state courts doubtless have jurisdiction to entertain suits for damages against federal officers. *Harris* v. *Dennie,* 3 Pet. 292; *Teal* v. *Felton,* 12 How. 284; *Buck* v. *Colbath,* 3 Wall. 334; *Leroux* v. *Hudson,* 109 U. S. 468. But it is more doubtful that state courts have authority to entertain prosecutions against federal officers. *Ohio* v. *Thomas,* 173 U. S. 276; see *In re Loney,* 134 U. S. 372; cf. *Johnson* v. *Maryland,* 254 U. S. 51; Compare *In re Mendenhall,* 10 F. Supp. 122 (D. Mont.).

We recognize that our argument carries a harsh consequence, in that plaintiffs seeking to enjoin a federal officer to protect rights of less than $3,000 are denied, except in the courts of the District of Columbia, a relief open to others. But the remedy, we think, lies with Congress rather than with a subjection of federal functions to the compulsory process of state courts.

II

CONGRESS HAS AUTHORIZED AND HAS RATIFIED THE CHALLENGED GRAZING RULES

The Supreme Court of Nevada, as we have shown, had neither jurisdiction nor power in this suit to pass on the validity of the system of temporary licenses and uniform fees prescribed in the Grazing Rules approved by the Secretary of the Interior on March 2, 1936 (reprinted *infra,* pp. 65–69). But, assuming that it had power to decide, its decision that the licenses and fees are unauthorized by the Taylor Grazing Act was erroneous.

A. THE LICENSES AND FEES ARE AUTHORIZED BY THE ACT

1. *They Are Authorized by Section 2.*—Section 2 of the Taylor Grazing Act (*infra,* p. 60) confers broad authority upon the Secretary. He shall—

> make provision for the protection, administration, regulation, and improvement of such grazing districts * * *, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary

> to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; * * *

This language is patterned after that of the Forest Reserve Act of 1897 (Sec. 1, 30 Stat. 35, 16 U. S. C., Sec. 551), a provision which this Court has twice construed as sufficiently broad to warrant the issuance of licenses and the collection of uniform fees for grazing livestock on national forests.[54] *United States* v. *Grimaud,* 220 U. S. 506; *Light* v. *United States,* 220 U. S. 523. There can, therefore, be no doubt that Section 2 of the Taylor Grazing Act, if it stood alone, would be ample authority for the issuance of temporary licenses and the collection of uniform fees of the character prescribed by the Rules of March 2, 1936.

2. *The Authority is Not Destroyed by Section 3.*— Respondents seek to escape the settled scope of the broad authority conferred by Section 2 of the Taylor Grazing Act by arguing that Section 2 is

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[54] The Forest Reserve Act, as amended at the time of the *Grimaud* case (220 U. S. at 509) provided that the Secretary of Agriculture was authorized to—

> make provision for the protection against destruction by fire and depredations upon the public forests and forest reservations * * *; and he may make such rules and regulations and establish such service as will insure the objects of such reservation, namely, to regulate their occupancy and use, and to preserve the forests thereon from destruction; * * *

impliedly restricted by the specific provisions of Section 3, which deal with the issuance of term permits. The court below so ruled (R. 55–57). A contrary opinion is indicated in *Gavica* v. *Donaugh*, 93 F. (2d) 173 (C. C. A. 9th).

Section 3 of the Act, *infra*, pp. 61–62, authorizes the Secretary, upon the payment of reasonable fees, to issue permits for grazing upon the public range. The class of permittees is defined and the grant of preferential rights are prescribed. The permits shall be for a period of not more than ten years, and renewal preferences are provided.

It cannot be denied that the Secretary of the Interior, in undertaking the administration of the Taylor Grazing Act in 1934, was faced with some very large and very practical problems. More than 15,000 persons had been using the public range under an implied license, grazing thereon more than 8,000,000 head of livestock annually.[55] Although the Taylor Grazing Act terminated this implied license,[56] it nevertheless recognized that previous

[55] Cf. Annual Report, Sec'y Int., 1937, pp. 105–106.

[56] In the silence of Congress, there is an implied grazing license. *Buford* v. *Houtz*, 133 U. S. 320. But the Taylor Grazing Act is plainly intended to terminate this license. Section 3 provides for term grazing permits, and none would question that unlicensed use of the land is forbidden after they are available. And the temporary licenses issued under Section 2 are substantially the same, both in terms and in the statutory authority, as those issued under the Forest Reserve Act. In *Light* v. *United States*, 220 U. S. 523, 535, this Court expressly ruled that the implied license conferred no vested right upon those who used the range and was terminated by the regulation of the Secretary.

users should be accorded certain priority rights, to be based upon citizenship, residence in or near a grazing district, the ownership or occupancy of other grazing facilities, and the possession of water rights. Section 3, *infra*, p. 61. The determination and allocation of grazing privileges among some 15,000 prior users in accordance with these provisions was no small administrative undertaking.

The Secretary realized that a hasty and improper issuance of term permits could have disastrous consequences. If too many were issued, the evils which the Act was designed to remedy, such as overgrazing, soil erosion, and range destruction would be continued and even aggravated, because the renewal requirements of Section 3 are so rigid as in many cases to prevent any subsequent equitable cancellation of such permits.[57] On the other hand, if too few were issued, the livestock industry would be completely disrupted during the transition period.

The Secretary, in addition, had the tremendous task of creating, after a hearing held in each State,

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And in *Omaechevarria* v. *Idaho*, 246 U. S. 343, 352, the Court held in terms that "Congress has not conferred upon citizens the right to graze stock upon the public lands. The Government has merely suffered the lands to be so used." See, also, *United States* v. *Grimaud*, 220 U. S. 506, 521; *Itcaina* v. *Marble*, 56 Nev. 420, 432–433, 55 P. (2d) 625 (1936).

[57] Section 3 (*infra*, pp. 61–62) gives the existing permittees a "preference right" and provides that no permittee shall be denied a renewal when the denial would impair the value of his grazing unit pledged as security for a *bona fide* loan.

grazing districts for some 142,000,000 acres, or 221,875 square miles.[58] Section 1, *infra*, p. 59. The grazing permits for this vast area were to be issued "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time." Section 3, *infra*, p. 61. This required that some sort of estimate be made of the value of the various lands for grazing.

To complicate matters still further, the capacity of the range in many places had been impaired by prolonged drought, by rodents, and by overgrazing. If these lands were to be restored, the inauguration of certain protective and rehabilitation measures was immediately necessary. Whether these lands could be restored depended upon the effectiveness of these measures and to some extent upon the whims of nature. Section 3 could not be complied with until these speculative factors were reduced to a minimum.

Quite evidently, the accumulation of the necessary data could not be completed for a long period of time.[59] This was known to Congress when it

[58] This area is substantially larger than that of New England and the Middle Atlantic States (including West Virginia and Maryland) combined.

[59] In fact, after six years, the task is only now nearing completion. Term permits have been issued in one district and authorized in another. During the next few months, permits are to be issued to approximately 50% of the present holders of temporary licenses, with additional permits in succeeding years as the necessary data is finally correlated. The Department of the Interior states that Nevada Grazing District No. 1, where this suit arises, cannot be placed on a permit basis for at least another year.

passed the Act. For example, Associate Forester Sherman had told the Public Lands Committee in 1933 that "There is not in the country an organization that would be prepared or equipped to put all of these [public] lands under administration tomorrow. It will have to be done gradually."[60] Mr. Taylor, the sponsor of the Act, was of a similar opinion: "Of course, it will take some time to readjust the grazing rights [under the new Act]."[61]

Accordingly, it was only natural that the Secretary's power to issue permits should be cast in permissive rather than mandatory terms. Under Section 1, *infra*, p. 59, he was "authorized, in his discretion, by order to establish grazing districts." Under Section 3, *infra*, p. 61, he was "authorized to issue or cause to be issued permits to graze livestock on such grazing districts." The Secretary's authority is plainly to be exercised as an when it becomes feasible.

In contrast, Section 2, *infra*, p. 60, is phrased in mandatory language. The Secretary "*shall* make provision for the protection, administration, regulation and improvements" of the grazing districts; he "*shall* make such regulations * * * and do any and all things to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occu-

[60] Hearings, H. Committee on Public Lands, H. R. 2835, 73d Cong., 1st Sess., and H. R. 6462, 73d Cong., 2d Sess. (1934), p. 51.

[61] *Ibid*, p. 77. Cf. similar observations made to the committee by Secretary Ickes, *ibid.*, p. 136.

pancy and use * * *." It could not have been the purpose of Congress to make the protection and regulation of the range await the completion of the major administrative task faced by the Secretary, and the contrast in the mandatory and permissive language aptly points the Congressional decision. Cf. *Moore* v. *Illinois Central R. Co.*, No. 550, this Term.

Under Section 2, modeled upon the Forest Reserve Act, the Secretary was fully empowered to prescribe temporary licenses and uniform fees (*supra*, pp. 42–43). Congress could not have intended to destroy this power, given in the form of a mandatory direction, by permissive authority to institute a more refined system of licensing. An enumeration of things which *may* be done does not restrict other grants of authority more broadly worded. *Springer* v. *Philippine Islands*, 277 U. S. 189, 206. Congress knew that a permanent licensing system would take years to develop, and could hardly have intended by granting the additional authority in Section 3 to destroy the powers, granted the Secretary by Section 2, to take immediate steps to preserve the public range. Any such construction would frustrate the explicitly declared purposes of the Act and would read into its provisions an unreasonable and self-defeating interpretation.[62] The separate sections of an Act

[62] The committee reports on the Taylor Grazing Act underscore the magnitude and the urgency of its objec-

are normally to be taken as supplementary rather than mutually destructive.

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tives. Each report states (H. Rept. No. 903, 73d Cong., 2d Sess., pp. 1–2; S. Rept. 1182, 73d Cong., 2d Sess., pp. 1–2):

"At the present time there are approximately 173,000,000 acres of unreserved and unappropriated public land in the ownership of the Federal Government, situated almost wholly in 11 Western States. These public lands form a vast domain, composing more than one-tenth of the entire area of the United States. Their surface is now and always has been a great grazing common free to all users. The grazing resources of these lands are now being used without supervision or regulation, and there is constant competition among the various users who desire to obtain exclusive benefit of the forage growth. The result of this competitive practice has been lack of proper care and progressive deterioration in the value of the native forage crop, with the attendant evils of soil erosion and removal of protection in drainage areas. It has been estimated that for the open public domain as a whole the yield of forage has been reduced from one-half to two-thirds during the last 25 years. Without regulation further destruction is inevitable.

Where overgrazing is permitted to disturb the balance of nature, erosion must result, which in turn increases flood hazards and promotes the siltation of irrigation reservoirs and ditches and jeopardizes the water supply for irrigation, urban consumption, and other uses. So ruinous a use of the public domain should not be permitted and, if it is continued, will result in the reduction of these vast areas to eroded and barren wastes.

The situation above set forth is a source of grave national concern, both to Government officials interested in the conservation of the natural resources of the public domain and stockmen whose operations are dependent upon grazing. The stockman desires assured grazing privileges, on the basis of which definite plans for public operations can be adopted, and the Government desires the conservation and wise development of an extremely valuable, natural resource. Since the lands are the property of the Federal Government, it is its responsibility, as well as its right, to

The primary purpose of all rules of statutory construction, of course, is to ascertain and give effect to the intent of the legislature. *United States* v. *American Trucking Ass'ns,* 310 U. S. 534, 542; *Foster* v. *United States,* 303 U. S. 118, 120; *Gulf States Steel Co.* v. *United States,* 287 U. S. 32, 45. No rule of construction can be followed so blindly as to produce an absurd result and defeat the declared purposes of the law. *Danciger* v. *Cooley,* 248 U. S. 319, 326. It is submitted that respondents' rule of construction, were it to be applied during the infancy of this statute, would defeat the very purposes of the Act and would render it unworkable.

Quite obviously the provision in Section 3 that permits are to be issued "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time," does not preclude the issuance of temporary licenses, or even permits, at a low uniform fee. The temporary rates (5¢ a month for each head of cattle and 1¢ for sheep) are regarded by the Department of the Interior as far below the actual value of the public range, and hence certain not to be unreasonable in any particular case. The "reasonable fee' provision of Section 3 was inserted for the benefit of the stockmen—to prevent *excessive* exactions. If

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protect and improve them, so that they may be put to the highest productive use, to stabilize the livestock industry, to protect watersheds, and check erosion."

the Government elects to charge a lower fee, the stockmen cannot complain.[63]

An administrative construction which is within the language of a statute should not be lightly disturbed by the courts. *Brewster* v. *Gage*, 280 U. S. 327, 336. The construction placed on Sections 2 and 3 of the statute by the agency charged with its administration advances the purposes, and does no violence to the language, of the Taylor Grazing Act. And it is to be remembered that administrative practice "has peculiar weight when it involves a contemporaneous construction of a statute by the men charged with the responsibility of setting its machinery in motion, of making the parts work efficiently and smoothly while they are yet untried and new." *Norwegian Nitrogen Co.* v. *United States*, 288 U. S. 294, 315; *Fawcus Machine Co.* v. *United States*, 282 U. S. 375, 378.

B. THE LICENSES AND FEES HAVE BEEN RATIFIED BY CONGRESS

The system of temporary licenses and uniform fees prescribed by the Grazing Rules of March 2, 1936, is, then, fully authorized by the Taylor Grazing Act. But, even if there were originally room for doubt, there can be none at this day. For Congress has by subsequent legislation ratified the sys-

[63] The allegation in the complaint that the uniform fees are not reasonable (R. 9) presents at least a conclusion of fact, if not one of law, and is not admitted by the demurrer. *Missouri Pacific R. Co.* v. *Norwood*, 283 U. S. 249, 254, and cases cited; *Pierce Oil Corp.* v. *City of Hope*, 248 U. S. 498, 500.

tem of temporary licenses and uniform fees of which respondents complain. In fact, these regulations have been approved in three different ways:

1. *Congress Has Made Appropriations Based on the Fees.*—Congress at an early date and on a number of occasions was apprised of the fact that the Department was issuing temporary licenses instead of term permits.[64] In testifying before a Subcommittee of the House Committee on Appropriations in December 1935—almost three months before the promulgations of the rules and regulations of March 2, 1936—Mr. Carpenter (the then Director of the Division of Grazing) pointed out that *temporary licenses, as distinguished from permits,* were to be issued on a uniform fee basis during the coming year and that the total revenue therefrom would be approximately $1,000,000—of which 25% (or $250,000.00) could be appropriated for range improvements under Section 10 of the

[64] In addition to the appropriation committee hearings referred to, *infra*, pp. 53–54, see also the Annual Reports of the Secretary of the Interior: 1936, pp. 16–17; 1937, pp. xii, 102, 105–107; 1938, pp. xv, 107. In a letter read into the Congressional Record on March 25, 1937, Mr. Carpenter made the following statement: "At the very beginning of this matter [the administration of the Taylor Grazing Act], I realized that it would take several years to get enough accurate information and knowledge of the subject to issue term permits with fairness, and for that reason the division has functioned on a temporary yearly basis and has issued licenses only. This has enabled us to correct our rules as we go along. * * *." 81 Cong. Rec., pt. III, pp. 2738–2739 (1937). Cf. 81 Cong. Rec., pt. IV, pp. 4570–4571 (1937); 83 Cong. Rec., pt. III, pp. 2548–2549 (1938).

act. Mr. Taylor, the author of the grazing act in question and also chairman of the House Appropriation Subcommittee, asked Mr. Carpenter to explain to the Committee the difference between licenses and permits. Mr. Carpenter pointed out in some detail the vast administrative problems which confronted the division, and explained the reasons for a temporary license system.[65] Mr. Taylor and other members of his committee saw nothing unusual or illegal in this program. In fact, the committee not only recommended the appropriation of $400,000.00 for general administrative expenses but also $250,000.00 for range improvements, with the proviso that the sum expended for improvements in any one grazing district should not exceed 25% of the moneys collected in that district.[66] This recommendation passed the House[67] and Senate[68] and became law.[69] Inasmuch as Congress knew that no permits were to be issued during the ensuing year and that any fees obtained would come from temporary licenses, the appropriation of money for range improvements on the basis of fees collected in the several grazing districts (25% of the estimated $1,000,000 revenue to be derived from temporary licenses) constitutes a ratification of the temporary license and fee system

[65] Hearings, Subcommittee of H. Committee on Appropriations, H. R. 10630, 74th Cong., 2d Sess. (1936), pp. 13–15.
[66] H. Rept. No. 1927, 74th Cong., 2d Sess. (1936), p. 3.
[67] 80 Cong. Rec., pt. II, pp. 1256, 1274 (1936).
[68] 80 Cong. Rec., pt. III, p. 3026 (1936).
[69] Act of June 22, 1936, c. 691, 49 Stat. 1757, 1758.

inaugurated by the Department pursuant to Section 2 of the Act. Any other construction of the appropriation statute renders it meaningless.

The subsequent appropriation hearings for the Division of Grazing have disclosed that uniform fees were being charged and collected for the issuance of temporary licenses.[70] And each successive appropriation act has authorized the expenditure of $250,000.00 for range improvements, the amount to be spent in any one district not to exceed 25% of the moneys collected therein.[71] Since the only moneys collected under the authority of the Act prior to 1939[72] were those received from the issuance of temporary licenses, these appropriations acts constitute a complete congressional ratification of the administrative practice of issuing tem-

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[70] Fiscal year 1938—Hearing, Subcommittee of H. Committee on Appropriations, H. R. 6958, 75th Cong., 1st Sess. (1937), pp. 80, 83, 89.

Fiscal year 1939—Hearings, Subcommittee of H. Committee on Appropriations, H. R. 9621, 75th Cong., 3d Sess. (1938), pp. 65, 70, 71; Hearing, Subcommittee of S. Committee on Appropriations, H. R. 9621, 75th Cong., 3d Sess. (1938), pp. 3, 28, 29.

[71] Act of August 9, 1937, c. 570, 50 Stat. 564, 565; Act of May 9, 1938, c. 187, 52 Stat. 291, 292; Act of May 10, 1939, c. 119, 53 Stat. 685, 687; Act of June 18, 1940, c. 395, Pub., No. 640, 76th Cong., 3d Sess.

[72] No permits were issued in 1936, 1937, or 1938, and in only one district in 1939. Annual Report, Sec'y Int., 1936, pp. 14, 15, 16; ibid., 1937, pp. 105, 106, 108; ibid., 1938, pp. 107, 109, 113. See also 83 Cong. Rec., pt. XI, p. 2376 (1938); Cong. Rec., 76th Cong., 1st Sess., No. 131, pp. 11642, 11645 (1939).

porary licenses on a fee basis under the Rules and Regulations of March 2, 1936.[73] *Hamilton* v. *Dillin,* 21 Wall. 73, 96–97; *Street* v. *United States,* 133 U. S. 299, 307; *Wells* v. *Nickles,* 104 U. S. 444; *Isbrandtsen-Moller Co.* v. *United States,* 300 U. S. 139, 147; *Swayne & Hoyt Ltd.* v. *United States,* 300 U. S. 297, 301, 302; *Duke Power Co.* v. *Greenwood County,* 91 F. 2d 665, 673, 674 (C. C. A. 4), aff'd, 302 U. S. 485.

2. *Congress virtually reenacted the Taylor Grazing Act in 1936.*—Knowing that the Division of Grazing was operating under a temporary license and uniform-fee system, Congress in June 1936 extended the provisions of the Taylor Grazing Act to another 62,000,000 acres of the public domain by removing the original 80,000,000-acre limitation and authorizing the establishment of grazing districts with a combined area of 142,000,000 acres.[74] This amounted to a virtual reenactment of the statute as to lands not embraced in the original Act of 1934, and is evidence of Congressional approval of the then existing administrative construction of the Act. *United States* v. *Alexander,* 12 Wall. 177,

[73] Fifty percent of the fees collected from temporary licenses have been paid to the States pursuant to the provisions of Section 10 of the act. Nevada, we are informed by the Division of Grazing, had received $191,414.40 by June 30, 1940. Her share has been affected by the injunction issued in the present case.

[74] Act of June 26, 1936, c. 842, 49 Stat. 1976.

180; *National Lead Co.* v. *United States,* 252 U. S. 140, 146.[75]

The amendatory Act of June 26, 1936, c. 84. 49 Stat. 1976–1979, not only widened the scope of Section 1, but it also amended Sections 7, 8, 10, and 15 of the original Act. A large part of the Act was rewritten. But Sections 2 and 3 were left unchanged. The failure of Congress to amend those sections in the face of the construction placed on them by the Department "is at least persuasive of a legislative recognition and approval of the statute as construed." *McCaughn* v. *Hershey Chocolate Co.,* 283 U. S. 488, 493; *Massachusetts Mutual Life Ins. Co.* v. *United States,* 288 U. S. 269, 273. See *Swigart* v. *Baker,* 229 U. S. 187.[76]

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[75] In the *Alexander* case Congress in 1853 and 1855 extended a pension law to cover persons not included in the 1848 act; the 1855 amendment was held to constitute an approval of rules promulgated under the 1853 act as to when pensions should commence. In the *National Lead* case Congress extended the usual tariff drawback provision to oil cake made from imported seed; this was held to constitute an implied approval of the administrative interpretation of the drawback provisions which were then in force as to other articles.

[76] In the *Swigart* case it was declared to be significant that Congress had never taken any adverse action on the Secretary of the Interior's reports showing that assessments were being collected for the maintenance as well as for the construction of reclamation projects. See also *Alaska Steamship Co.* v. *United States,* 290 U. S. 256, 262; *Costanzo* v. *Tillinghast,* 287 U. S. 341, 345; *National Lead Co.* v. *United States,* 252 U. S. 140, 146; *Borax* v. *Ickes,* 98 F. 2d 271, 281 (App. D. C.), certiorari denied, 305 U. S. 619; *Corning Glass Works* v. *Robertson,* 65 F. 2d 476 (App. D. C.), certiorari denied, 290 U. S. 645.

3. The Civil Relief Act expressly recognizes the validity of the licenses and fees.—The Soldiers' and Sailors' Civil Relief Act of October 17, 1940, which became law one week before the opinion below was rendered, and which was not called to the Nevada court's attention, should remove any doubt that Congress has sanctioned the temporary license system of which respondents complain. Section 501 of that Act (Public, No. 861, 76th Congress., 2nd Sess.) reads as follows:

> (2) If a permittee *or licensee* under the [Taylor Grazing] Act of June 28, 1934 (48 Stat. 1269), enters military service, he may elect to suspend his permit *or license* for the period of his military service and six months thereafter, and the Secretary of the Interior by regulations shall provide for *such* suspension of permits *and licenses* and for the *remission, reduction, or refund of grazing fees* during such suspension. [Italics added.]

Both permits *and licenses* are recognized by this Act. Since the only licenses issued under the Taylor Grazing Act are those provided for in the regulations here in question, this statute is unequivocal ratification by Congress of these regulations.

The court below seems to have found some merit in the Government's ratification argument, but for reasons which are not quite clear concluded that the ratification was ineffective (R. 57). In so holding, the court below erred. That Congress, under its power to make all needful rules and regulations respecting the public land, could have expressly provided for a temporary license and fee system must

be conceded. *Sinclair* v. *United States*, 279 U. S. 263, 294, 297; *Light* v. *United States*, 220 U. S. 523, 536–537. What Congress can authorize, it can, of course ratify. *Charlotte Harbor Ry.* v. *Welles*, 260 U. S. 8, 11; *Hodges* v. *Snyder*, 261 U. S. 600, 602, 603; *Swayne & Hoyt Ltd.* v. *United States*, 300 U. S. 297, 302. And it is well settled that such ratifying legislation is applicable and may be given retroactive effect by the appellate court even though it may have been enacted after the court of first instance passed upon the administrative action involved. *United States* v. *Schooner Peggy*, 1 Cranch 103, 110; *Dinsmore* v. *Southern Express Co. &c.*, 183 U. S. 115, 120; *Tiaco* v. *Forbes*, 228 U. S. 549, 556; Cf. *Vandenbark* v. *Owens-Illinois Glass Co.*, No. 141, this Term.

CONCLUSION

The decision below should be reversed, and the Nevada courts should be directed to dismiss the complaint, either because of the want of jurisdiction and indispensable parties or because the complaint fails to state a cause of action.

Respectfully submitted.

FRANCIS BIDDLE,
Solicitor General.

NORMAN M. LITTELL,
Assistant Attorney General.

WARNER W. GARDNER,
Special Assistant to the Attorney General.

CHARLES R. DENNY,
VERNON L. WILKINSON,
Attorneys.

APRIL 1941.

APPENDIX

Pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269, as amended by the Act of June 26, 1936, c. 842, 49 Stat. 1976 (43 U. S. C., Supp. V, sec. 315 *et seq.*):

> *Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled,* That in order to promote the highest use of the public lands pending its final disposal, the Secretary of the Interior is authorized, in his discretion, by order to establish grazing districts or additions thereto and/or to modify the boundaries thereof, not exceeding in the aggregate an area of one hundred and forty-two million acres of vacant, unappropriated, and unreserved lands from any part of the public domain of the United States (exclusive of Alaska), which are not in national forests, national parks and monuments, Indian reservations, revested Oregon and California Railroad grant lands, or revested Coos Bay Wagon Road grant lands, and which in his opinion are chiefly valuable for grazing and raising forage crops: *Provided,* That no lands withdrawn or reserved for any other purpose shall be included in any such district except with the approval of the head of the department having jurisdiction thereof. * * * Before grazing districts are created in any State as herein provided, a hearing shall be held in the State, after public notice thereof shall have been given, at such location convenient for the attend-

ance of State officials, and the settlers, residents, and livestock owners of the vicinity, as may be determined by the Secretary of the Interior. No such district shall be established until the expiration of ninety days after such notice shall have been given, nor until twenty days after such hearing shall be held: *Provided, however,* That the publication of such notice shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement. Nothing in this Act shall be construed as in any way altering or restricting the right to hunt or fish within a grazing district in accordance with the laws of the United States or of any State, or as vesting in any permittee any right whatsoever to interfere with hunting or fishing within a grazing district.

SEC. 2. The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; and the Secretary of the Interior is authorized to continue the study of erosion and flood control and to perform such work as may be necessary amply to protect and rehabilitate the areas

subject to the provisions of this Act, through such funds as may be made available for that purpose, and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500.

SEC. 3. That the Secretary of the Interior is hereby authorized to issue or cause to be issued permits to graze livestock on such grazing districts to such bona fide settlers, residents, and other stock owners as under his rules and regulations are entitled to participate in the use of the range, upon the payment annually of reasonable fees in each case to be fixed or determined from time to time: *Provided,* That grazing permits shall be issued only to citizens of the United States or to those who have filed the necessary declarations of intention to become such, as required by the naturalization laws and to groups, associations, or corporations authorized to conduct business under the laws of the State in which the grazing district is located. Preference shall be given in the issuance of grazing permits to those within or near a district who are landowners engaged in the livestock business, bona fide occupants or settlers, or owners of water or water rights, as may be necessary to permit the proper use of lands, water or water rights owned, occupied, or leased by them, except that until July 1, 1935, no preference shall be given in the issuance of such permits to any such owner, occupant, or settler whose rights were acquired between January 1, 1934, and December 31, 1934, both dates inclusive, except that no permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such

permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan. Such permits shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior, who shall specify from time to time numbers of stock and seasons of use. During periods of range depletion due to severe drought or other natural causes, or in case of a general epidemic of disease, during the life of the permit, the Secretary of the Interior is hereby authorized, in his discretion to remit, reduce, refund in whole or in part, or authorize postponement of payment of grazing fees for such depletion period so long as the emergency exists: *Provided further,* That nothing in this Act shall be construed or administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law. So far as consistent with the purposes and provisions of this Act, grazing privileges recognized and acknowledged shall be adequately safeguarded, but the creation of a grazing district or the issuance of a permit pursuant to the provisions of this Act shall not create any right, title, interest, or estate in or to the lands.

* * * * *

SEC. 5. That the Secretary of the Interior shall permit, under regulations to be prescribed by him, the free grazing within such districts of livestock kept for domestic purposes; and provided that so far as author-

ized by existing law or laws hereinafter enacted, nothing herein contained shall prevent the use of timber, stone, gravel, clay, coal, and other deposits by miners, prospectors for mineral, bona fide settlers and residents, for firewood, fencing, buildings, mining, prospecting, and domestic purposes within areas subject to the provisions of this Act.

* * * * * *

SEC. 10. That, except as provided in sections 9 and 11 hereof, all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received under this Act during any fiscal year is hereby made available, when appropriated by the Congress, for expenditure by the Secretary of the Interior for the construction, purchase, or maintenance of range improvements, and 50 per centum of the money received under this Act during any fiscal year shall be paid at the end thereof by the Secretary of the Treasury to the State in which the grazing districts or the lands producing such moneys are situated, to be expended as the State Legislature of such State may prescribe for the benefit of the county or counties in which the grazing districts or the lands producing such moneys are situated: *Provided*, That if any grazing district or any leased tract is in more than one State or county, the distributive share to each from the proceeds of said district or leased tract shall be proportional to its area in said district or leased tract.

* * * * * *

SEC. 15. The Secretary of the Interior is further authorized, in his discretion, where

vacant, unappropriated, and unreserved lands of the public domain are so situated as not to justify their inclusion in any grazing district to be established pursuant to this Act, to lease any such lands for grazing purposes, upon such terms and conditions as the Secretary may prescribe: *Provided*, That preference shall be given to owners, homesteaders, lessees, or other lawful occupants of contiguous lands to the extent necessary to permit proper use of such contiguous lands, except that when such isolated or disconnected tracts embrace seven hundred and sixty acres or less, the owners, homesteaders, lessees, or other lawful occupants of lands contiguous thereto or cornering thereon shall have a preference right to lease the whole of such tract, during a period of ninety days after such tract is offered for lease, upon the terms and conditions prescribed by the Secretary.

* * * * *

SEC. 17. The President shall have power, with the advice and consent of the Senate, to select a Director of Grazing. The Secretary of the Interior may appoint such Assistant Directors and such other employees as shall be necessary to administer this Act. The Civil Service Commission shall give consideration to the practical range experience in public-land States of the persons found eligible for appointment by the Secretary as Assistant Directors or graziers. No Director of Grazing, Assistant Director, or grazier shall be appointed who at the time of appointment or selection has not been for one year a bona fide citizen or resident of the State or of one of the States in which such Director, Assistant Director, or grazier is to serve.

Pertinent provisions of the Grazing Regulations of March 2, 1936 (R. 23–27):[1]

UNITED STATES
DEPARTMENT OF THE INTERIOR
Office of the Secretary
DIVISION OF GRAZING
Washington

RULES FOR ADMINISTRATION OF GRAZING DISTRICTS

(Under the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act)

Permits within the meaning of section 3 of the act of June 28, 1934 (48 Stat. 1269), shall be issued as soon as the necessary data are available upon which to ascertain the proper use of the lands and water which entitle their owners, occupants or lessees to a preferential grazing privilege.

During the intervening period, temporary licenses will be issued under authority of section 2 of said act to provide for the existing livestock industry using the public lands in such districts.

Licenses

Licenses issued in 1936 will be operative only during that year or for such part of 1937 as may be considered the "winter grazing season" as determined by local usage, but in no event will extend beyond May 1, 1937.

[1] These regulations have been amended from time to time, but the changes do not affect the legal problems here involved. The current regulations are to be found in 43 Code of Federal Regulations, secs. 501 *et seq.*

Such licenses will be revocable for viol
tion of the terms thereof and will termina
on the issuance of permits in a district.

An applicant for a grazing license is qua
ified if he owns livestock and is:

1. A citizen of the United States of Ame
ica or one who has filed his declaration
intention to become such, or

2. A group, association or corporation a
thorized to conduct business under the lav
of the State in which the grazing district
located.

The following definitions will be used i
issuing licenses only:

Property shall consist of land and it
products or stock water owned or controlle
and used according to local custom in live
stock operations. Such property is:

(a) *"Dependent"* if public range is re
quired to maintain its proper use.

(b) *"Near"* if it is close enough to be use
in connection with public range in usual an
customary livestock operations. In case th
public range is inadequate for all the nea
properties, then those which are nearest i
distance and accessibility to the public rang
shall be given preference over those not s
near.

(c) *"Commensurate"* for a license for
certain number of livestock if such propert
provides proper protection according to loca
custom for said livestock during the perio
for which the public range is inadequate.

Priority of use.—Is such use of the publi
range before June 28, 1934, as local custo
recognized and acknowledged as a prope
use of both the public range and the land
or water used in connection therewith.

Issuance of licenses

After residents within or immediately adjacent to a grazing district having dependent commensurate property are provided with range for not to exceed ten (10) head of work or milch stock kept for domestic purposes, the following named classes, in the order named, will be considered for licenses:

1. Qualified applicants, with dependent commensurate property with priority of use.
2. Qualified applicants with dependent commensurate property but without priority of use.
3. Qualified applicants who have priority of use but not commensurate property.
4. Other qualified applicants.

Licenses will be issued in the above-named order of classes until the carrying capacity of the public range shall be attained. If a class more than exhausts the capacity of the range, all junior classes will be eliminated, and cuts within the last-recognized class shall be made by reduction of numbers or limitation of seasonal use until the number equal to the fixed carrying capacity of the public range is reached.

Fees

A grazing fee of five (5) cents per head per month or fraction thereof, for each head of cattle or horses and one (1) cent per month, or fraction thereof, for each sheep or goat shall be collected from each licensee except free-use licenses.[1]

* * * * *

[1] Cf. 43 Code of Federal Regulations, sec. 501.16.

General Rules of the Range

The following rules shall supersede all previous rules heretofore promulgated for grazing districts created under the act of June 28, 1934 (48 Stat. 1269), and shall be operative in all grazing districts in the States of Arizona, California, Colorado, Idaho, Oregon, Montana, Nevada, New Mexico, Utah, and Wyoming.

The following acts are prohibited on the lands of the United States in said grazing districts under the jurisdiction of the Division of Grazing of the Department of the Interior:

1. The grazing upon or driving across any public lands within said grazing districts of any livestock without a license.

2. Grazing upon or driving across said grazing district lands of any livestock in violation of the terms of a license.

3. Allowing stock to drift and graze on said district lands without a license.

4. Constructing or maintaining any kind of works, structure, fence, or inclosure without authority of law or license.

5. Destroying, molesting, disturbing, or injuring property used, or acquired for use, by the United States in the administration of grazing districts.

The following rules for fair range practice will be complied with by all licensees within said grazing districts:

1. All licenses will comply with the laws of the State within which the grazing district is located in regard to the number and kind of bulls turned on the range.

2. Crossing licensees shall follow the route prescribed in the crossing license, at a rate of not less than five (5) miles per day for sheep or goats and ten (10) miles per day for cattle and horses.

Procedure for Enforcement of Penalties for Violation of the Rules and Regulations

Section 2 of the act of June 28, 1934 (48 Stat. 1269), commonly known as the Taylor Grazing Act, provides that "any wilful violation of the provisions of this act" or of "rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

* * * * *

The foregoing rules for administration of grazing districts shall be effective immediately as to all grazing districts now established and to all new grazing districts when established and they supersede Division of Grazing Circulars Nos. 1, 2, 4, and 6 heretofore issued.

F. R. CARPENTER,
Director of Grazing.

Approved March 2, 1936.

HAROLD L. ICKES,
Secretary of the Interior.

U. S. GOVERNMENT PRINTING OFFICE: 1941

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FILE COPY

No. 718

IN THE

Supreme Court of the United States

October Term, 1940

L. R. BROOKS,

Petitioner,

v.

ARCHIE J. DEWAR, *et al.*

On Petition for a Writ of Certiorari to the Supreme Court of the State of Nevada

MEMORANDUM FOR THE RESPONDENTS IN OPPOSITION TO THE ISSUANCE OF A WRIT ON THE SECOND AND THIRD QUESTIONS PRESENTED

WILLIAM J. DONOVAN,
2 Wall Street,
New York, N. Y.

MILTON B. BADT,
First National Bank Building,
Elko, Nevada,
Counsel for the Respondents.

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OPINIONS BELOW

The opinion of the Supreme Court of Nevada (R. 42-57) is reported in 106 P. 2d 755. The District Court did not write an opinion.

JURISDICTIONAL STATEMENT

The judgment of the Supreme Court of the State of Nevada sought to be reviewed was entered on October 24, 1940 (R. 57). The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925, on the ground that the de-

cision below denied rights, titles and immunities claimed by the petitioner under the Constitution, statutes and authority of the United States (Pet. 1-2).

The "jurisdictional statement" in the petition is in error in stating that the District Court "ordered the Regional Grazier to permit certain stockmen in Nevada to graze their livestock on the public domain 'in default of payment of the grazing fee * * * and in default of obtaining a * * * temporary license' prescribed by the Secretary's rules and regulations" (Pet. 2). The decree of the District Court provides:

> "That the defendant herein be, and he hereby is perpetually enjoined from barring, or threatening to bar, plaintiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 in default of payment of the grazing fee of five cents per month or fraction thereof per head of cattle, and one cent per month or fraction thereof per head of sheep, grazed upon such public range and in default of obtaining a new temporary license as required by said rules of March 2, 1936" (R. 35).

This decree confers no affirmative rights with respect to the public range. Even the negative relief granted thereby is extremely limited in character. The petitioner Brooks is not enjoined from barring the respondents from the range for violation of any *lawful* rule or regulation promulgated by the Department of the Interior. The only prohibition upon Brooks is that he not bar the respondents from the range for failure to pay the fees and obtain the licenses required by the Rules of March 2, 1936, which conditions the respondents claim (and the courts below have held) were unauthorized and invalid.

QUESTIONS PRESENTED

The questions presented, as framed by the petitioner, are:

1. Whether, under the Taylor Grazing Act, the Secretary of the Interior has authority, pending the collection of the data necessary for the issuance of term permits, to charge a low uniform fee for temporary licenses issued to persons grazing livestock on public lands within grazing districts established under that Act.[1]

2. Whether the United States is an indispensable party to a suit brought by stockmen in Nevada to compel the Regional Grazier to permit them to graze their livestock on the public range in that state without procuring a temporary license and without incurring liability for the fees prescribed therein.

3. Whether the Secretary of the Interior is an indispensable party to a suit brought to enjoin a subordinate from enforcing rules and regulations which the Secretary himself promulgated (Pet. 3).

As noted above, the second question presented is improperly phrased in that the decree did not confer any affirmative rights on the respondents.

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[1] The respondents' complaint alleges that the Rules of March 2, 1936 were illegal and void not only because the fees required thereby were uniform but on several other grounds. (See Complaint, par. 14, R. 8-10.) If the complaint can be sustained on any of these grounds, the judgment below may be affirmed even though the first question presented is decided adversely to the respondents. If the writ issues the respondents will argue these points in accordance with the rule announced in *Stelos Co.* v. *Hosiery Motor-Mend Corp., et al.*, 295 U. S. 237, 238-9 (1935).

STATEMENT

This case arose in the Supreme Court of Nevada on appeal from a decree of permanent injunction entered upon the petitioner's failure to answer further after his demurrer to the complaint had been overruled (R. 34). As stated by the court below, the petitioner did not move to strike out any part of the complaint, and, since he elected to stand on his demurrer, every relevant and material fact alleged in the complaint must be accepted as true (R. 56). These allegations appear at R. 1-28 and a detailed description thereof is contained in the opinion of the court below at R. 42-49.

The "statement" in the petition is defective in that it ignores relevant and material allegations which must be considered if a writ issues to review the first question presented. Since the respondents do not oppose the issuance of a writ to review that question, they accept the petitioner's "statement" for the purposes of this memorandum.

SUMMARY OF ARGUMENT

The respondents do not oppose the issuance of a writ to review the first question presented by the petition. They oppose the issuance of a writ to review the second and third questions presented for the reasons that (1) the Supreme Court of Nevada correctly held in accordance with the decisions of this Court that the United States is not an indispensable party to this suit, and (2) the question whether the Secretary of the Interior is an indispensable party to this suit is a question of state practice and procedure and the decision of the Supreme Court of Nevada on this question is conclusive.

ARGUMENT

I.

The Supreme Court of Nevada correctly held in accordance with the decisions of this Court that the United States is not an indispensable party to this suit.

The only relief which the respondents seek in this suit is an injunction restraining the petitioner Brooks from doing something which he has no authority to do—viz., enforcing the unauthorized and illegal Rules of March 2, 1936 which were purportedly promulgated under authority of the Taylor Grazing Act. The decisions of this Court establish beyond dispute that such a suit is not one against the United States or one to which the United States is an indispensable party. When a government official acts without authority, his act ceases to be the act of the Government; he stands stripped of governmental sanction and acts as an individual.

Noble v. *Union River Logging Co.*, 147 U. S. 165 (1893);

American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94 (1902);

Ex parte Young, 209 U. S. 123 (1908);

Philadelphia Co. v. *Stimson*, 223 U. S. 605 (1912);

Northern Pac. Ry. Co. v. *North Dakota*, 250 U. S. 135 (1919);

Payne v. *Central Pac. Ry. Co.*, 255 U. S. 228 (1921).

The petitioner seeks to distinguish this case from the authorities cited on the ground that this is a suit brought "to acquire an interest in, or the right to use" the public lands. He argues that:

> "Respondents have no property rights in the public grazing lands in Nevada. Their implied license to graze livestock on such lands was terminated by the Taylor Grazing Act. Cf. *Light* v. *United States*, 220 U. S. 523, 535. Their suit is not one to enjoin an officer of the United States from interfering with their rights in the public range, but rather a suit to compel an officer to permit them to use the public range in conjunction with their private grazing facilities, on the plea that the latter cannot be profitably operated unless respondents are also allowed to make use of the public domain" (Pet. 13).

The petitioner's argument that the respondents are seeking to establish a right or title adverse to that of the United States is erroneous. Prior to the passage of the Taylor Grazing Act, the respondents had an implied license to graze their cattle on the public range. (*Light* v. *United States*, 220 U. S. 523, 535 [1911].) The Taylor Grazing Act by itself did not revoke the respondents' implied license. It provided that the Secretary of the Interior "is authorized, in his discretion, by order to establish grazing districts * * *" (Section 1, R. 15) and that the publication of notice of the establishment of a district "shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement" (Id., R. 16). The withdrawal of lands from entry of settlement, however, did not revoke the re-

spondents' implied license to graze their livestock on the public range. Even the promulgation of rules and regulations under Section 2 did not destroy the respondents implied license if, as claimed, the rules and regulations are invalid. It is only when a valid licensing system is established under the Taylor Grazing Act that the respondents' implied license to graze their livestock on the range can be impaired.

In each of the cases cited by the petitioner, a party was attempting to establish or rely on a title adverse to that of the United States. In *United States* v. *Minnesota*, 305 U. S. 382, this Court held that the United States was an indispensable party defendant in condemnation proceedings brought by a state to acquire a right of way over lands which the United States owned in fee. In *New Mexico* v. *Lane*, 243 U. S. 52, the State of New Mexico claimed to have acquired title to certain public lands, and the Secretary of the Interior had been enjoined from disposing of them through issue of a patent thereto to a private individual. In *Louisiana* v. *Garfield*, 211 U. S. 70, the State of Louisiana sued to establish its title to certain public lands which the Secretary of the Interior had ordered held for disposition under the General Land Laws.

In seeking to protect their right to do business from unauthorized intervention by the petitioner Brooks, the respondents are not seeking to establish any right or title adverse to that of the United States. They are merely saying that (1) they have an implied license to graze their livestock on the public range until Congress or some official properly acting under the authority of Congress revokes their implied license; (2) the authority which Con-

gress gave the Secretary of the Interior to revoke their implied license has never been properly exercised; (3) the continued enjoyment of their implied license is indispensable to the conduct of their businesses; and (4) the petitioner Brooks, acting under color of invalid rules and regulations, threatens to destroy their businesses by interfering with their implied license.

Upon this petition we must assume that the Rules of March 2, 1936 are invalid. Unless the respondents' contentions with respect to those rules are "so unsubstantial and frivolous as to afford no basis for jurisdiction" the respondents are entitled to prosecute this suit and to have it determined without joining the United States as a party, even though it may ultimately be held that the Rules of March 2, 1936, are authorized and valid (*Northern Pacific Ry. Co.* v. *North Dakota*, 250 U. S. 135, 152 [1919]). The allegations of the complaint and the decisions of the courts below show that the respondents' attack upon the Rules of March 2, 1936, is neither unsubstantial nor frivolous.

Two federal district courts have had no difficulty in deciding this question in accordance with the principles heretofore laid down by this Court.

On October 21, 1936, the United States District Court for the District of Nevada remanded this case to the state court whence it had been removed by the petitioner. The court found specifically that the interests of the United States were not involved in the suit, saying:

> "* * * The plaintiffs do not question the right of the United States government, through the Congress, to regulate the use of any part of its public domain. Nor do they question the right of the Con-

> gress to enact the Taylor Grazing act, or the delegation of power to the Secretary of the Interior, under the act, to require the payment of a license fee. They assert a right *not contrary* to the act, but one *under it.*" (*Dewar* v. *Brooks,* 16 F. Supp. 636, 643-44 [1936].)

Thereafter the United States itself brought suit, seeking to have the further prosecution of this action enjoined on the ground, *inter alia,* that "property rights of the United States are involved, and that the United States is an indispensable party defendant to said suit." The respondents moved to have the suit of the United States dismissed. Their motion was granted, and the Court said:

> "It is further contended 'that property rights of the United States are involved, and that the United States is an indispensable party defendant in said suit.' The case at bar does not present any question of trespass or threatened unlawful trespass upon the public domain or any question of claimed right thereon in conflict with the paramount rights of the United States therein." (*United States* v. *Dewar,* 18 F. Supp. 981, 983 [1937].)

The United States never appealed from the decree of dismissal in *United States* v. *Dewar.*

II.

The question whether the Secretary of the Interior is an indispensable party to this suit is a question of state practice and procedure and the decision of the Supreme Court of Nevada on this question is conclusive.

Respondents believe that the court below correctly decided that the presence of the Secretary of the Interior

is not in any way necessary to a complete determination of this suit; that complete relief can be granted without his presence; and that such relief will neither prejudice his rights nor restrict his activities. (*Colorado* v. *Toll*, 268 U. S. 228 [1925].) On this petition, however, we need not go into this question. Nor, need we go into the question whether the law as to necessary parties in the federal courts should be clarified.

The issue here presented is not a federal question but one of general equity jurisdiction. This is made clear by the origin of the rule for which the petitioner contends. As Judge Learned Hand observed in *National Conference on Legalizing Lotteries* v. *Goldman*, 85 F. (2d) 66, cited by the petitioner,

> "The whole notion [of the indispensability of a superior officer] appears to have had its source in a judgment of Lord Hardwicke's in 1740 (*Vernon* v. *Blackerby*, 2 Atkins 144), the reasoning in which is also not clear" (85 F. [2d] at 67).

The earliest case cited by the petitioner, *Warner Valley Stock Company* v. *Smith*, 165 U. S. 28 (1897) (Pet. 15), is based upon Lord Hardwicke's comments in *Vernon* v. *Blackerby* referred to by Judge Hand. The two other cases

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[1] In this case the plaintiff sought a mandatory injunction that the Secretary of the Interior be "commanded and enjoined to prepare for issuance unto your orator, in accordance with law, patents for said lands" (165 U. S. at 29). Since "the main object of the present bill was to compel the defendant Hoke Smith, as Secretary of the Interior, to prepare patents to be issued to the plaintiff for the lands in question" (165 U. S. at 33) the presence of the Secretary of the Interior was indispensable in granting the specific affirmative relief prayed for.

principally relied on by the petitioner—*Webster* v. *Fall*, 266 U. S. 507 and *Gnerich* v. *Rutter*, 265 U. S. 388 (Pet. 15)—in turn are based upon the decision in *Warner Valley Stock Company* v. *Smith*.

The issue presented by the petition does not assume a federal character merely because it happens to arise between a federal officer and a state court. It is simply an issue of general equity jurisdiction which was in controversy before the formulation of our federal system of government. The Supreme Court of Nevada has now decided this question to its satisfaction for the purpose of litigation in the Nevada courts.

Section 8565 of the Nevada Compiled Statutes (1929) provides:

> "The court may determine any controversy between parties before it, when it can be done without prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in * * *"

The decision of the Supreme Court of Nevada to which the petitioner objects was simply a decision that, as a matter of general equity jurisdiction, the presence of the Secretary of the Interior was not necessary to a complete determination of this suit. That decision was one of state practice and procedure, and the decision of the Supreme Court of Nevada on such a subject is conclusive.

Newman v. *Gates*, 204 U. S. 89 (1907);
John v. *Paullin*, 231 U. S. 583 (1913).

This Court has uniformly held that it will not review a decision of a state court upon a purely state question even though questions of federal law are also presented by the record.

Murdock v. *City of Memphis*, 20 Wall. 590 (1875);
Sauer v. *New York*, 206 U. S. 536 (1907);
Detroit & Mackinac Ry. v. *Paper Co.*, 248 U. S. 30 (1918).

CONCLUSION

For the reasons stated, we respectfully submit that the writ, if granted, should be restricted to Question 1, involving the construction of the Taylor Grazing Act.

Respectfully submitted,

WILLIAM J. DONOVAN,
2 Wall Street,
New York, N. Y.

MILTON B. BADT,
First National Bank Building,
Elko, Nevada,
Counsel for the Respondents.

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IN THE

Supreme Court of the United States

October Term, 1940

No. 718

L. R. BROOKS,

Petitioner,

v.

ARCHIE J. DEWAR, ET AL.

On Writ of Certiorari to the Supreme Court of the State of Nevada

BRIEF FOR RESPONDENTS

WILLIAM J. DONOVAN,
2 Wall Street,
New York, N. Y.

MILTON B. BADT,
Elko, Nevada,
Counsel for Respondents.

R. R. IRVINE,
New York, N. Y.

JOHN HOWLEY,
New York, N. Y.
of Counsel.

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BRIEF FOR THE RESPONDENTS

OPINIONS BELOW

The opinion of the Supreme Court of Nevada (R. 42-57) is reported in — Nev. —, 106 P. (2d) 755. The district court did not write an opinion.

JURISDICTION

The judgment of the Supreme Court of Nevada was entered on October 24, 1940 (R. 57-58). The petition for a writ of certiorari was filed on January 24, 1941, and was

granted on March 10, 1941. The jurisdiction of this Court rests on Section 237 (b) of the Judicial Code, as amended by the Act of February 13, 1925.

QUESTIONS PRESENTED

Certiorari was granted on a petition raising the following questions:

> "1. Whether under the Taylor Grazing Act the Secretary of the Interior has authority pending the collection of the data necessary for the issuance of term permits, to charge a low uniform fee for temporary licenses issued to persons grazing livestock on public lands within grazing districts established under that Act.
>
> "2. Whether the United States is an indispensable party to a suit brought by stockmen in Nevada to compel the Regional Grazier to permit them to graze their livestock on the public range in that state without procuring a temporary license and without incurring liability for the fees prescribed therein.
>
> "3. Whether the Secretary of the Interior is an indispensable party to a suit brought to enjoin a subordinate from enforcing rules and regulations which the Secretary himself promulgated."

Petitioner's brief has revised the wording of these questions and has added a fourth question giving it the number "3". The additional question recited is:

> "4. Whether the state courts have jurisdiction to enjoin the actions of a federal official."

Question numbered 1, as stated by petitioner, should be revised to eliminate the word "low." This character-

ization is completely *dehors* the record and is negatived by allegations in the complaint (R. 6) which are admitted by demurrer.

Question numbered 1 should be restated more exactly as follows:

> Whether, irrespective of the provisions of Section 3 of the Taylor Grazing Act which authorize the Secretary of the Interior to issue grazing permits on payment of reasonable fees, in each case to be fixed and determined, and under express requirements and restrictions as to qualifications of permittees, preferences, tenure, renewability and recognition of existing water rights and grazing rights, he may provide, under the power contained in Section 2, for the issuance of temporary revocable licenses at a uniform fee and without compliance with the said requirements and restrictions of Section 3.

The question so restated follows the question presented to and decided by the Supreme Court of Nevada (R. 55).

Question numbered 2, as above presented by petitioner, would make it appear that the respondent sought mandamus to compel the Regional Grazier to permit their livestock to graze on the public domain without license and without payment of fees. Such is not the case. The plaintiffs prayed that petitioner be enjoined from barring their livestock from the range in default of obtaining the licenses and paying the fees required by the allegedly unauthorized regulations (R. 14).

As to question numbered 3, respondents are uncertain whether petitioner has abandoned this point unless it is

held that the suit is one against the United States (Pet. Br. 9, 24, 27, 34).

STATUTES AND REGULATIONS INVOLVED

The pertinent provisions of the Taylor Grazing Act of June 28, 1934, c. 865, 48 Stat. 1269 are printed at R. 15-23 as Exhibit A to the complaint. The pertinent provisions of the "Rules for Administration of Grazing Districts," under such act, which were approved by the Secretary of the Interior on March 2, 1936 and issued by the Director of Grazing are printed at R. 23-27 as Exhibit B to the complaint.

STATEMENT

Settlers in the arid West from the beginning of the livestock industry enjoyed what has been described by this Court as an implied license to graze their livestock on the public domain (*Buford* v. *Houtz*, 133 U. S. 320, 326). During that period, the western states in the exercise of their police power passed sundry statutes which to a large extent controlled and governed the use of the range. The approval of these statutes by state and federal courts was uniformly recited to be subject to the paramount right of control in Congress whenever exercised (*Buford* v. *Houtz, supra; Omaechevarria* v. *Idaho*, 246 U. S. 343; *Bacon* v. *Walker*, 204 U. S. 313).

Each of the respondents is a stockraiser of this class, owning or leasing agricultural property, pasture and grazing lands and having stockwatering rights on the public domain (which are vested under state law), but depending

on the public domain for his grazing requirements as it is economically impossible to own all the necessary grazing land required for livestock. The livestock business of each respondent has been built up by this practice. The respondents' base properties where they raise hay to feed their stock during winter would be without value without use of the range for summer grazing, and the range itself has no economic value unless used in connection with such base properties (R. 3, 4, 9).

In 1934 Congress passed the Taylor Grazing Act[1] designed to prevent over-grazing on the public domain, to provide for its improvement and development, and to stabilize the livestock industry dependent upon it. The pertinent sections of the Taylor Grazing Act provide that (1) the Secretary of the Interior is authorized to establish grazing districts (Sec. 1); (2) he is to regulate their occupancy and use, and to make necessary rules and regulations for such purpose (Sec. 2); and (3) he is authorized under certain conditions and with specific restrictions to issue grazing permits to qualified applicants upon payment of reasonable fees to be fixed and determined in each case (Sec. 3).

From the date of the approval of the Act in 1934, no permits under the provisions of Section 3 of the Act have been issued. On March 2, 1936 the Director of Grazing, with the approval of the Secretary of the Interior, promulgated certain regulations to the effect that, until sufficient necessary data was available, permits would not be issued, but in their place temporary licenses would be issued "under authority of Section 2" (R. 23). Such licenses recited

[1]Act of June 28, 1934, c. 865, 48 Stat. 1269, 43 U. S. C. 315 *et seq.*

on their face that they were temporary and revocable (R. 9, 23). They were to be issued upon payment of a uniform fee of five cents per head per month for horses and cattle and one cent per head per month for sheep. This fee was applicable to all lands in all grazing districts (R. 9, 25).

The petitioner herein, who was then the Acting Regional Grazier for Nevada Grazing District #1, threatened to bar the livestock of the respondents from the range in default of obtaining the temporary revocable licenses and payment of the uniform fee assessed (R. 28). The respondents promptly filed their bill in the Fourth Judicial District Court of the State of Nevada to restrain such threatened action, claiming that the temporary revocable licenses offered them were in violation of the requirements of Section 3 of the Act which govern the provisions of the issuance of grazing permits. They alleged (1) that the uniform fee had not been fixed or determined as a reasonable fee in each case, that no attempt had been made to ascertain any of the various factors determinative of the reasonableness of the fee, and that by reason of varying conditions in thirty-four grazing districts in eleven states, a uniform fee could not be a reasonable fee as to each case; (2) that the temporary licenses were not for a term of years as required by Section 3; (3) that the temporary licenses carried with them no rights of renewal as required by Section 3; (4) that they were revocable without qualification or restriction on such right of revocation; (5) that the nature of such licenses diminished and impaired their right to the use of water for stockwatering purposes and that they did not adequately safeguard their grazing privileges as required by Section 3 (R. 8-10).

Brooks demurred to the complaint, his demurrer was overruled, and upon his failure to answer further, judg-

ment was entered against him as prayed (R. 31-35). On appeal, the judgment was affirmed. The Supreme Court of Nevada held that the complaint stated a cause of action, that the suit was not one against the United States, and that the Secretary of the Interior was not an indispensable party. Its opinion is printed in the record (R. 42-57). It held, among other things, that the uniform rates assessed "do not conform to the limitations prescribed in §3" and "cannot be reconciled with the idea of 'reasonable fees in each case to be fixed or determined from time to time'" (R. 56). "* * * nothing has been presented in this case which would justify us in * * * holding that, regardless of and contrary to the provisions of §3, the fees could legally be based upon the uniform rate prescribed by the Rules of March 2, 1936, or that any part of said Rules can be held valid if inconsistent with that section or any other provisions of the Grazing Act" (R. 57).

Certiorari was granted by this Court on March 10, 1941 to review the decision of the Supreme Court of Nevada. The respondents did not oppose the issuance of the writ upon the merits, *i.e.*, the question of construction of Sections 2 and 3 of the Act.

While the suit was pending in the *nisi prius* court, it was removed to the Federal District Court. Motions to remand and to dismiss were filed by the plaintiff and defendant respectively. The suit was remanded because of the lack of the jurisdictional limitation as to the value of the matter in controversy (*Dewar* v. *Brooks*, 16 F. Supp. 636). Thereafter, the United States brought suit in the United States District Court for the District of Nevada to restrain the further prosecution of the suit in the state court on the grounds that the suit interfered with the exer-

cise by the United States of its control of the public domain, that it embarrassed the United States in the possession of its property, that it harassed Federal officers in the performance of their official duties, that the Secretary of the Interior and the United States were indispensable parties. This suit was dismissed on motion (*United States* v. *Dewar*, 18 F. Supp. 981), and the United States did not appeal.

Thereafter, the United States brought thirty-nine suits against the respondents herein in the same court for the collection of grazing fees allegedly due under the regulations above referred to. The bills were dismissed upon the ground the regulations of March 2, 1936 were void (*United States* v. *Achabal, et al.*, 34 F. Supp. 1).

It is so consistently urged by the petitioner that this suit is against the United States and that the respondents seek free access to the public domain with their livestock and to avoid charges of trespass against them for such use of the public domain, that it is important to make clear that the prayer of the bill seeks no such relief (Pet. Br. 8, 15, 16, 17).

Respondents do not attack the constitutionality of the Taylor Grazing Act. They do not attack the delegation of power to the Secretary of the Interior as unlawful. They do not question the right of Congress to provide for the regulation, use and disposition of any part of the public domain. They do not question the right of the Secretary to promulgate all proper rules and regulations authorized by the Act. They claim no title to any part of the public domain or any right to use the same without payment of lawfully imposed fees or without complying with all lawful regulations requiring the obtaining of permits for such

purposes. They do not question the right of the Secretary or the Grazing Service to enforce by civil and criminal proceedings, or by actual impoundment of the livestock, any lawful rules and regulations that have been or may be promulgated. They do not seek free use of the range. They ask only that the regulations promulgated and the fees fixed be such as are authorized by and not contrary to the Act of Congress.

SUMMARY OF ARGUMENT

I.

The Nevada Court had jurisdiction to enter the decree and had all parties before it necessary to give complete relief.

A. The suit is not laid against the United States. Respondents do not question the complete ownership of the public domain by the United States, its right of dominion over the same, the right of Congress to make all provisions for the use, occupancy, control or disposition thereof, the validity of the Taylor Grazing Act, or the right of the Secretary of the Interior to make and enforce rules under its provisions. They assert rights not contrary to the Act but under it. They do not seek to disturb the Government's possession or use of the lands or to interfere with any governmental functions authorized by the Act. They have not sued Brooks in his official capacity. They sue to enjoin his tortious acts which, being without warrant of law, are the acts of an individual and not those of a federal officer.

An affirmance in this case will leave the respondents liable to obtain such permit and to pay such fees which may be required by lawful regulations under the act. A reversal will render them liable to the rules and regulations of March 2, 1936 found by the Supreme Court of Nevada to be unlawful. In neither event are the rights of the United States affected.

B. If the suit be not against the United States, petitioner concedes that the presence of the Secretary of the Interior is not important. However, the Secretary is not an indispensable party. (*Colorado* v. *Toll,* 268 U. S. 228). The rule as to the indispensability of the Secretary, applied in some cases,[1] has no application here. Joinder of parties is a matter of state practice and the Supreme Court of Nevada properly held that the joinder of the Secretary was not essential.

C. Should this Court consider the assignment (not raised below or in the petition for certiorari) that in no event can a state court enjoin the activities of one claiming to act as a federal officer, we submit that (1) this Court has never so held; (2) in analogous cases this Court has sustained actions in state courts against federal officers; (3) the cases relied on by petitioner the principle of which he asks be extended hereto are *sui generis* and afford no sound basis for the extension of their ruling; (4) special acts of Congress granting exclusive jurisdiction to the federal courts in certain classes of cases impliedly leave the state courts with jurisdiction in the present case; and

[1] *e. g.* suits to control the discretion of the superior officer and suits in which mandatory affirmative relief is sought.

(5) a denial of jurisdiction of the state courts in *all* injunction cases involving federal officers would have the harsh and unjust effect of depriving plaintiffs seeking to enjoin a federal officer to protect rights of less than $3,000 of any remedy in any court, which remedy is not denied to others.

II.

The regulations of March 2, 1936 are unauthorized in the respects complained of and have not been ratified by Congress.

A. Sections 2 and 3 of the Taylor Act, in light of their language and arrangement and their long legislative history, shows unmistakably a Congressional intention that any licensing system thereunder must conform with the requirements of Section 3; and *quaere* whether sole licensing power does not issue exclusively from Section 3. The Forest Reserve Act of 1897 and *United States* v. *Grimaud*, 220 U. S. 506, are of no assistance in construing the Taylor Act since the former act contained no limitations such as are in Section 3.

The rejection of a subsequent attempt to repeal a provision of Section 3 (the McCarran amendment) confirms the original legislative intent. Respondents construe the sections, in accordance with precedent of this Court, to give effect to both, whereas the Secretary of the Interior has ignored Section 3 and repealed its effect by administrative action.

Section 3 provides sufficient discretion and flexibility to meet the alleged administrative problems. Alleged requirements of expediency do not justify a violation of Congressional direction.

B. Congress has not ratified by implication the unlawful assertion of authority by any subsequent legislation. When analyzed, such legislation does not manifest an intention to ratify. When the act is unambiguous in its terms and the regulations in dispute are not of long standing and are attacked in their infancy, the principle of ratification is inapplicable. Precedent cited by petitioner is analyzed to show its inapplicability herein.

ARGUMENT

I.

THERE ARE NO JURISDICTIONAL DEFECTS NOR IS THERE A LACK OF AN INDISPENSABLE PARTY.

The Supreme Court of Nevada held correctly that this is not a suit against the United States (R. 50; *infra*, point A, p. 13) and that the Secretary of the Interior is not an indispensable party defendant (R. 50; *infra*, point B, p. 23). The *nisi prius* court in Nevada had jurisdiction to issue the injunction, (*infra*, point C, p. 31). Its jurisdiction to restrain one purporting to act as a Federal officer was not challenged in either of the state courts, and this Court will not consider an alleged jurisdictional defect of a state court not presented to or considered by the state courts or raised in the petition for certiorari (*infra*, point C1, p. 31).

A. This is not a suit against the United States.

Congress alone has power to prescribe the disposition of the public lands (Constitution, Art. IV, Sec. 3). Administrative officials have no authority to act in respect of them except as authorized by Congress. So when petitioner refers to "the Government", (Pet. Br. 14, 17, 22 *et al*) he means either Congress or an executive acting within the authority granted by Congress. *Butte City Water Co.* v. *Baker*, 196 U. S. 119, 126; *United States* v. *United Verde Copper Co.*, 196 U. S. 207, 215; *Light* v. *United States*, 220 U. S. 523; *United States* v. *George*, 228 U. S. 14, 22.

We do not dispute that the determination whether a suit is one against the United States is to be determined by the effect of the decree. What is the decree? It is that the defendant be enjoined from barring, or threatening to bar "plaintiffs from grazing their livestock upon the public range within Nevada Grazing District No. 1 *in default of payment of the grazing fee of 5 cents per month or fraction thereof per head of cattle, and 1 cent per month or fraction thereof per head of sheep, grazed upon such public range and in default of obtaining a new temporary license as required by said rules of March 2, 1936*"[1] (R. 35).

What is the effect of the decree? The decree is *in personam* as to Brooks alone.[2] It does not bind his successors. It prevents Brooks from ejecting respondents from the public range for one reason only: by asserting against them provisions of regulations which respondents claim are illegal in that they contradict the direction of Congress to the Secretary of the Interior in a phase of the administration of the public lands.

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[1] The decree follows in *haec verba* the prayer for relief (R. 14). Emphasis throughout has been added by respondents except as otherwise noted.

[2] There is neither mystery nor sedulous silence as to the capacity in which Brooks is sued, and he is not sued in his official capacity (Pet. Br. 18-19). The caption of the case names him as a personal defendant without official designation, viz., "L. R. Brooks, defendant". He is so identified throughout the complaint and no relief is sought or has been secured against his office (R. 2, 14, 34, 35). The allegations describing his office, under the cloak of which he has asserted unwarranted authority (Compl. Par. 2, R. 2) relate to the circumstances out of which the dispute arose. After describing such office, the complaint alleges that the "enforcement of said rules, if accomplished, would not be the official act of the United States by its Acting Regional Grazier" (Compl. Par. 2, R. 3).

Respondents do not question Brooks' right to eject them from the range under any provisions of the Rules of March 2, 1936 other than the ones attacked herein. Thus, for example, if respondents were otherwise not entitled to a license because they were not within a qualified group, or, if, while grazing under the protection of the injunction, they should violate the Secretary's rules of the range as to conservation and orderly use, Brooks could eject them.

What will be the title of the United States upon the adjudication of this suit? It will not be affected in any manner. If the decree is affirmed, respondents will become subject to the regulations thereafter promulgated by the Secretary that are consistent with the direction of Congress. The present decree will confer no protection as to such regulations. If the decree is reversed, the adjudication, in effect, will be that respondents should have had licenses beginning in May, 1936 and hereafter must have them. In either event, respondents will graze under license of the United States and no rights hostile to the title of the United States or its right to possession will have been created except such that are created voluntarily by the United States. There is no trespass which might ripen by prescription against the title of the United States.[3] In fact, prescription cannot run against the United States.

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[3] Two Federal District Courts as well as the Supreme Court of Nevada have so held in this litigation. On removal and remand, Yankwich, J. wrote:

"* * * The plaintiffs do not question the right of the United States Government, through the Congress, to regulate the use of any part of its public domain. Nor do they question the right of the Congress to enact the Taylor Grazing act, or the delegation of power to the Secretary of the In-

United States v. *Nashville R. R. Co.*, 118 U. S. 120; *United States* v. *Insley*, 130 U. S. 263.

Nor is the implied license to graze on the range revoked[4] (*Buford* v. *Houtz*, 133 U. S. 320), until the Secretary of the Interior establishes a valid license system under the Taylor Act. In *United States* v. *Grimaud*, 220 U. S. 506, 521, it was held that the implied license as to forest lands was revoked by the passage of Forest Reserve Act *and the rules and regulations promulgated under it*, which were held valid. The Taylor Act provides that the publication by the Secretary of notice to establish a grazing district "shall have the effect of withdrawing all public lands within the exterior boundary of such proposed grazing districts from all forms of entry of settlement." (Sec. 1,

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terior, under the act, to require the payment of a license fee. They assert a right *not contrary* to the act, but one *under* it." (*Dewar et al.* v. *Brooks*, 16 Fed. Supp. D. C. Nev. 636, 643. Emphasis by the Court.)

Thereafter when the United States sued to restrain respondents herein from prosecuting this suit in the state court on the ground, *inter alia*, that the suit was one against it, the bill of the United States was dismissed (see Pet. Br. 6). On this issue, Norcross, J. said:

> "It is further contended 'that property rights of the United States are involved, and that the United States is an indispensable party defendant in said suit.' The case at bar does not present any question of trespass or threatened unlawful trespass upon the public domain or any question of claimed right thereon in conflict with the paramount rights of the United States therein. *United States* v. *Grimaud*, 220 U. S. 506, 31 S. Ct. 480, 55 L. Ed. 563; *United States* v. *Babcock* (D. C.) 6 F. (2d) 160; *Babcock* v. *United States* (C. C. A.) 9 F. (2d) 905." (*United States* v. *Dewar*, D. C. Nev. 18 F. Supp. 981, at 983.)

The United States did not appeal from this decision.

[4] See Pet. Br. p. 44, note 56.

R. 16). The Act does not purport to revoke by its passage the implied license; nor would it in view of the impractical consequences as to any or all lands not first constituted by the Secretary into grazing districts, or, if so constituted, several or many years would elapse before regulation was attempted.

Petitioner states that "respondents ask only one thing: free access to the public lands of the United States" (Pet. Br. 15).[5] The respondents sought no such relief. They sought to protect from destruction, by equitable relief, their business from the illegal assertion of authority by Brooks. As a basis for equitable jurisdiction, respondents describe that business (R. 3-5), the manner in which Brooks' illegal assertion of authority threatens it (R. 10) and the irreparable nature of the injury threatened (R. 11-14). The protection of that business against illegal threats is a proper subject for equitable relief.[6] *International News Service* v. *Associated Press*, 248 U. S. 215, 236; *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535; *Red Canyon Sheep Co.* v. *Ickes*, 98 F. (2d) 308 (Ct. of App. D. C, 1938).[7]

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[5] See also Pet. Br. 8, 15, 16 and 17. It is difficult to reconcile petitioner's repeated assertion with the allegations in the petition and the record in this case. For example, the grazing fees due in May 1936 (see Complaint, Ex. D, R. 29) were deposited in Court in lieu of bond and were returned only upon entry of final decree (R. 35).

[6] In *Tennessee Valley Power Co.* v. *T. V. A.*, 306 U. S. 118, Pet. Br. p. 23, it was held that the freedom of public utilities holding non-exclusive franchises to be free from competition was not a legally protected right (at 140). Its limitation would be *damnum absque injuria.*

[7] In the *Red Canyon* case, where plaintiff's sheep business was carried on under a temporary license and would be destroyed by threatened illegal action of the Secretary in conveying the lands which were the subject of the license to another party, it was held

Nor are we seeking to "interfere with the functions of Government" (Pet. Br. 16) because the authority asserted by Brooks is not authority conferred by "the Government" which, in this case, is the Congress and the Secretary of the Interior only when acting under authority conferred.

It has been repeatedly held by this Court that when a Government official acts without authority, his act ceases to be the act of the Government; he stands stripped of governmental sanction and acts as an individual. If other conditions of equity jurisdiction are present he may be restrained as a trespasser. Such a suit is not one against the United States.[8]

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that equity had jurisdiction to protect the plaintiff's business from destruction by such illegal act; that the business of using the public domain for grazing livestock is a lawful business and that it will be protected by injunction; that if the Secretary sets up grazing districts under the Taylor Act, those who come within a preferred class "are entitled as of right to permits * * *" (at 314).

[8] It is submitted that all of petitioner's citations wherein the suit failed as one against the United States were under circumstances inapplicable herein (Pet. Br. 13-19, notes 9, 10, 13-17, 19). Several of them expressly distinguish the facts of this suit (see *infra*, p. 21). They comprise the following groups:

Suits against officers of states on defaulted bonds or other state fiscal obligations for the specific performance of the obligation, or the enforcement of a lien, or to collect special taxes designated for payment thereof: *Louisiana* v. *Jumel*, 107 U. S. 711, 720-723; *Hagood* v. *Southern*, 117 U. S. 52, 67-68; *Cunningham* v. *Macon & Brunswick R. R. Co.*, 109 U. S. 446, 457; *Christian* v. *Atlantic & N. C. Railroad*, 133 U. S. 233, 241; *Lankford* v. *Platte Iron Works*, 235 U. S. 461, 476; *North Carolina* v. *Temple*, 134 U. S. 22, 30; *New York Guaranty Co.* v. *Steele*, 134 U. S. 230, 232; *In re Ayers*, 123 U. S. 443, 502-506; *Smith* v. *Reeves*, 178 U. S. 436, 439;

Suits for specific performance of a contract by the government: *Wells* v. *Roper*, 246 U. S. 335, 337;

Noble v. *Union River Logging Co.*, 147 U. S. 165, 171, 172;
American School of Magnetic Healing v. *McAnnulty*, 187 U. S. 94, 108;
Ex Parte Young, 209 U. S. 123, 155, 156, 159;
Philadelphia Co. v. *Stimson*, 223 U. S. 605, 619;
Northern Pac. Ry. Co. v. *North Dakota*, 250 U. S. 135, 152;
Work v. *Louisiana*, 269 U. S. 250, 253-255.

Suits for the performance of a trust wherein the United States is the trustee or guardian of the property for the benefit of Indians: *Naganab* v. *Hitchcock*, 202 U. S. 473, 475; *Morrison* v. *Work*, 266 U. S. 481, 485;

Suits to divest the United States of title to or possession of its property, or wherein such would be the effect of a defense asserted: *Louisiana* v. *Garfield*, 211 U. S. 70, 77-78; *Goldberg* v. *Daniels*, 231 U. S. 218, 221-222; *Carr* v. *United States*, 98 U. S. 433, 438; *Stanley* v. *Schwalby*, 162 U. S. 255, 270, 283; *Leather* v. *White*, 296 Fed. 477, aff'd 266 U. S. 592; or to take possession of property or its proceeds lawfully in the custody of the state: *Governor of Georgia* v. *Madrazo*, 1 Pet. 110, 123-124; or to prevent the United States from disposing of its title to a third party: *New Mexico* v. *Lane*, 243 U. S. 52, 58; *Oregon* v. *Hitchcock*, 202 U. S. 60, 69-70;

Suits to prevent the United States from using its property, which allegedly incorporates a patented device: *Belknap* v. *Schild*, 161 U. S. 10, 25; *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 605; *James* v. *Campbell*, 104 U. S. 356; *Hollister* v. *Benedict*, 113 U. S. 59, 67-68;

Suits to restrain an officer from acting, or to mandamus him to act, in a matter wherein he has discretion: *Louisiana* v. *McAdoo*, 234 U. S. 627, 633; *Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 316, 324;

Negligence actions for a money judgment or a libel *in rem* to arrest a ship operated by a state officer: *Ex Parte State of New York, No. 1*, 256 U. S. 490, 501; *Ex Parte State of New York, No. 2*, 256 U. S. 503, 510-511.

In *Philadelphia Co.* v. *Stimson, supra,* the plaintiff, claiming that the Secretary of War did not have authority under statute to establish regulations in question concerning harbor lines on the Alleghany River, brought a bill to restrain the Secretary from causing threatened criminal prosecutions to be instituted against it for an alleged violation of these regulations. As to the contention that the bill was a suit against the United States, the present Chief Justice said:

> "If the conduct of the defendant constitutes an unwarrantable interference with property of the complainant, its resort to equity for protection is not to be defeated upon the ground that the suit is one against the United States. The exemption of the United States from suit does not protect its officers from personal liability to persons whose rights of property they have wrongfully invaded. *Little* v. *Barreme,* 2 Cranch 170; *United States* v. *Lee,* 106 U. S. 196, 220, 221; *Belknap* v. *Schild,* 161 U. S. 10, 18; *Tindal* v. *Wesley,* 167 U. S. 204; *Scranton* v. *Wheeler,* 179 U. S. 141, 152. And in case of an injury threatened by his illegal action, the officer cannot claim immunity from injunction process. The principal has frequently been applied with respect to state officers seeking to enforce unconstitutional enactments [citing cases]. And it is equally applicable to a Federal officer acting in excess of his authority or under an authority not validly conferred. *Noble* v. *Union River Logging R.R. Co.,* 147 U. S. 165, 171, 172; *School of Magnetic Healing* v. *McAnnulty,* 187 U. S. 94.
>
> "The complainant did not ask the court to interfere with the official discretion of the Secretary of War, but challenged his authority to do the things

of which complaint was made. The suit rests upon the charge of abuse of power, and its merits must be determined accordingly; it is not a suit against the United States."

Conversely, in several of the cases cited by petitioner[9] wherein a suit was held on the facts to be one against either a state or the United States, the decision affirmatively excepts the situation presented by the case at bar and expresses the rule stated above. Thus, in *Hagood* v. *Southern*, (117 U. S. 52) where holders of state scrip secured a mandatory injunction against state fiscal officers to compel them to accept the scrip in payment of taxes, it was held that the suit was one for specific performance of the state's obligation. This Court said:

> "A broad line of demarcation separates from such cases as the present, in which the decrees require, by affirmative official action on the part of the defendants, the performance of an obligation which belongs to the State in its political capacity, those in which actions of law or suits in equity are maintained against defendants who, while claiming to act as officers of the State, violate and invade the personal and property rights of the plaintiffs, under color of authority, unconstitutional and void. Of such actions at law for redress of the wrong, it was said by Mr. Justice Miller, in Cunningham v. Macon & Brunswick Railroad Co., ubi sup.: 'In these cases he is not sued as or because he is the officer of the government, but as an individual, and the court is not ousted of jurisdiction because he *asserts* author-

[9] Pet. Br. 13-19, notes 9, 10, 13-19. See also, for example, *In re Ayres*, 123 U. S. 443, 500-503; *Ex Parte State of New York No. 1*, 256 U. S. 490, 500.

> ity as such officer. To make out his defence he must show that his authority was sufficient in law to protect him (p. 452).' * * * And so the preventive remedies of equity, by injunction, may be employed in similar cases to anticipate and prevent the threatened wrong, where the injury would be irreparable, and there is no plain and adequate remedy at law, as was the case in *Allen* v. *Baltimore & Ohio Ry. Co.*, 114 U. S. 311, where many such instances are cited'' (at 70-71). (Emphasis by the Court.)

Petitioner does not appear to disagree with respondents as to the applicable law, but only as to the effect of the decree. Thus, in summarizing the cases wherein the suit was held not to be one against the United States, petitioner writes that "in a good number of cases the plaintiff has been allowed by the injunction suit against the officer to challenge the validity of regulatory statutes or regulations, in the outcome of which the Government can have no interest if the command be invalid"[10] (Pet. Br. 22).

If, by "the Government," petitioner refers to Congress, and it is held that the regulations of March 2, 1936 are invalid, Congress has no interest in the outcome of this suit other than to await administrative compliance with its direction. If, by "the Government," petitioner refers to the Secretary of the Interior, his interest in such event will be only to comply with the Congressional direction.

It is submitted that this is not a suit against the United States.

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[10] Citing *Ex Parte Young, supra;* the *American School of Magnetic Healing* v. *McAnnulty, supra; Truax* v. *Raich,* 239 U. S. 33; *Pierce* v. *Society of Sisters,* 268 U. S. 510.

B. The Secretary of the Interior is not an indispensable party defendant.

Respondent's brief tends to limit the discussion of this issue. It is clear from his brief that the petitioner does not consider the presence of the Secretary important unless it be determined by this Court that the suit is one against the United States. Petitioner says:

> "It is not so clear, if the suit is not laid against the United States, and if the respondents can obtain all they ask by restraint of the local officer, that the Secretary must be joined" (Pet. Br. 9; also *ibid*, pp. 24, 27).

The following amounts almost to an abandonment of the point that the Secretary is an indispensable party:

> "But it does not seem to us to be a matter of particular consequence, if the suit can in fact be brought against the officer rather than the government, whether the nominal defendant be the superior or the subordinate officer. Nor, in the case where the plaintiff can obtain all he seeks by compulsion of the subordinate alone, does there seem to be any compelling reason of logic or of law why the superior must necessarily be joined. In either case, the real objection is that the government itself is impleaded.
>
> "In the abstract, then, we view it as a matter of comparative indifference whether or not the respondents may proceed against the petitioner without joining the Secretary of the Interior" (Pet. Br. 34).

We do not see such identity of issue. Unless petitioner has abandoned its point as to the necessity of joining the

Secretary, it might be a possible, but, with respect, an unfortunate decision in this case that the suit is not one against the United States because the Secretary lacked authority as to the rules of March 2, 1936, but that for the determination of the question of authority, his presence is necessary. Further, for example, non-identity of issues would be apparent in a suit to clear title which Congress has authorized, which, without waiver, would be a suit against the United States, but is subsequently dismissed for failure to name or serve other necessary parties. But, whether or not the point as to indispensability is abandoned, and despite the conclusion that this is *not* a suit against the United States (*infra*, p. 13), we submit that *Colorado* v. *Toll*, 268 U. S. 228 is controlling and is correct in principle. A preliminary point must, however, be first presented.

1. ***Whether the Secretary is an indispensable party is a matter of state practice and, under the decision of this Court, the Supreme Court of Nevada has conclusively ruled thereon.***

The Supreme Court of Nevada held that it did not "find merit in appellant's second specification of error, that the district court erred in holding that the Secretary of the Interior was not an indispensable party defendant" (R. 50). The point had been raised by demurrer and determined by the state district court (R. 31, 32).

Section 8565 of the Nevada Compiled Statutes (1929) provides:

> "The court may determine any controversy between parties before it, when it can be done without

> prejudice to the rights of others, or by saving their rights; but when a complete determination of the controversy cannot be had without the presence of other parties, the court must then order them to be brought in * * *."

The decision of the Supreme Court of Nevada to which the petitioner objects was simply a decision that, as a matter of general equity jurisdiction, the presence of the Secretary of the Interior was not necessary to a complete determination of this suit. That the Supreme Court of Nevada relied on federal precedent for this issue does not establish that it was decided as a federal question (Pet. Br. 24) because there is no precedent in Nevada. Respondents' basic authority in the Nevada court was the statute quoted above. (See Resp. Br. p. 15, *Brooks* v. *Dewar*, Sup. Ct. Nev. #3287.) The decision was one of state practice and procedure, and the decision of the Supreme Court of Nevada on such a subject is conclusive.

> *Newman* v. *Gates*, 204 U. S. 89 (1907);
> *John* v. *Paullin*, 231 U. S. 583 (1913).

This Court has uniformly held that it will not review a decision of a state court upon a purely state question even though questions of federal law are also presented by the record.

> *Murdock* v. *City of Memphis*, 20 Wall. 590 (1874);
> *Sauer* v. *New York*, 206 U. S. 536 (1907);
> *Detroit & Mackinac Ry.* v. *Paper Co.*, 248 U. S. 30 (1918).

2. *The Secretary of the Interior is not an indispensable party.*

But on the assumption that the question of parties is one to be determined by this Court, and is still urged by petitioner though the action is clearly not against the United States, it is submitted that the Secretary is not an indispensable party to the determination of his statutory authority, any more than the members of Congress and the President are necessary parties to determine the constitutionality of a federal statute.

The point may, we think, be resolved through petitioner's own logic. He says:

> "Nor, in the case where the plaintiff can obtain all he seeks by compulsion of the subordinate alone, does there seem to be any compelling reason of logic or of law why the superior must necessarily be joined" (Pet. Br. 35).

Later, in discussing his difficulty in reconciling *Gnerich* v. *Rutter* with *Colorado* v. *Toll*, petitioner says:

> "The difficulty relates to the cases, such as this, where the plaintiff can obtain the relief he asks by compulsion of the subordinate alone" (Pet. Br. 31, note 36).

This then is a simple syllogism leading to the inevitable conclusion that it is not necessary to join the Secretary in this case.

Respondents appreciate the frankness and fairness with which the petitioner has discussed this point. However, all considerations of law and policy why the Secretary need not and should not be a necessary party herein have

not been set forth. They are, in summary fashion, as follows:

(1) *Colorado* v. *Toll*, 268 U. S. 228, is controlling and does not overrule *Gnerich* v. *Rutter*, 265 U. S. 388, which is inapplicable herein.[11]

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[11] In *Colorado* v. *Toll*, 268 U. S. 228, Colorado sought and secured injunctive relief against the director of the Rocky Mountain National Park to restrain the enforcement by him of regulations made by the Secretary relating to use of highways in the Park as "beyond the authority conferred by acts of Congress." It was held that the Secretary of the Interior was not a necessary party.

It is submitted that this decision is not limited to cases wherein or by the fact that the State of Colorado was plaintiff. Its presence as plaintiff, suing as *parens patriae*, related to an issue different from the question of necessary parties defendant. (See Record, *Colorado* v. *Toll*, Oct. Term 1924, Docket #234, Brief for Appellee, pp. 12-14, filed April 11, 1925, ibid.) Petitioner raises this possibility but does not urge it (Pet. Br. 30).

In *Gnerich* v. *Rutter*, 265 U. S. 388, plaintiff, a retail druggist, had been granted by the Prohibition Commissioner, as agent of the Commissioner of Internal Revenue, a license to sell a designated maximum amount of spiritous liquors. Plaintiff filed a bill against the local prohibition director that he show cause "why said purported limit so fixed in plaintiff's permit should not be by him disregarded pending the final hearing and determination of this cause, and why all lawful actions by complainant and others similarly situated to purchase alcohol and spiritous liquors *in such quantity or quantities as to them may be most advantageous to their business* as pharmacists should not be approved." (Record *Gnerich* v. *Rutter*, Oct. Term 1923, No. 79 p. 10; *Gnerich* v. *Yellowley*, 277 Fed. 632, 634, C. C. A. 9.) This Court held that the Commissioner of Internal Revenue was a necessary party and properly observed that, if the injunction were granted, "his are the hands which would be tied" (at 391).

It will be apparent that (1) the determination of the maximum amount of spiritous liquors licensed to be sold under the regulations of the Commissioner of Internal Revenue was a matter of the superior's discretion, upon application made by plaintiff; (2) plaintiff sought indirectly by restraint against the local prohibition director to nullify the discretionary limitation already fixed. These

(2) There is no logical reason for extending *Gnerich* v. *Rutter* beyond the situation where the exercise of discretion in the matter by the superior officer would be nullified by injunctive relief only against his subordinate.[12]

(3) This view avoids the necessity of holding, as has been done in some cases, (Pet. Br. p. 31, note 37) that *Colorado* v. *Toll* overrules *Gnerich* v. *Rutter*.

(4) The convenience to the Government in defending these suits in the District of Columbia is of far less weight than the fairly certain effect of virtually depriving of all remedy individuals living far distant.[15]

(5) The danger of conflicting orders bearing upon the subordinate officer (an injunction of a federal or state court on the one hand and the direction of a superior officer on the other) is more fancied than real (Cf. Pet. Br.

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points were so presented to this Court. (See Brief for Appellee, pp. 12, 17, *Gnerich* v. *Rutter*, Oct. Term 1923, No. 79.)

The National Prohibition Act provided a direct appeal to a court of equity to review the Commissioner's decision (*Gnerich* v. *Yellowly*, 632, 635). Plaintiff had not followed his proper remedy.

[12] This was the situation also in *Webster* v. *Fall*, 266 U. S. 507. The situation where the relief sought, if granted, would be ineffective because it requires an affirmative act to be done by the superior officer is governed by *Warner Valley Stock Co.* v. *Smith*, 165 U. S. 28.

[13] The Supreme Court of Nevada did not necessarily so hold (Contra, pet. Br. 31).

[15] "For the inconvenience to a plaintiff maneuvered by indispensability into litigating in Washington is obviously great" (50 Yale L. J. 916-17).

25). The superior officer will hardly be inclined to insist that his subordinate deliberately violate a court injunction while it remains in effect. Nor would he be expected to remove the subordinate merely to avoid the injunction.[16] The duties of a federal officer, as well as those of a state officer, may always involve individual liability.

(6) It is not an anomalous situation (Cf. Pet. Br. 28) particularly in a western state, far from the seat of government, to find a local enforcement officer the sole defendant when he alone sends notices signed by him to notify respondents that they will be "technically in trespass," and bringing to their attention the criminal provisions of the Taylor Grazing Act unless their grazing fees have been paid by a specified date (R. 14, 28). Impoundment of livestock is another consequence of trespass (R. 26). "The Secretary of the Interior is not personally doing or threatening the acts of trespass and of prosecution which are sought to be enjoined. Although the actors may be authorized and incited by him so that he would be a proper codefendant if he were within the court's reach, the court has the power to stop the trespassing by those within its jurisdiction, irrespective of their claim that they are acting for others." *Ryan* v. *Amazon Petroleum Corporation*, (71 Fed. (2d) 1, 4, C. C. A. 5; reversed on other grounds 293 U. S. 539; see also *Yarnell* v. *Hillsborough Packing Company*, 70 Fed. (2d) 435 (C. C. A. 5). The peti-

[16] These "arguments appear to unreality in view of the structure and habits of administrative agencies, which are hardly likely either to instruct subordinates to disregard court orders on pain of contempt, or to make changes in personnel merely to frustrate an injunction" (50 Yale L. J. 911).

tioner concedes the effectiveness of the relief sought against Brooks alone (R. 35).

(7) Except where the application of the indispensability rule seems necessary in cases where the superior should be free to use his discretion or where mandatory affirmative orders are sought against him, the indispensability rule would seem to be "a puzzling and useless hindrance to litigation."[17]

(8) Where, as in the instant case, the issue is one of statutory construction, and where, if the Secretary were a party and the action filed in Washington, the conduct of the trial and appeal would be by the representatives of the offices of the Attorney General and the Solicitor General who have appeared herein, the application of the indispensability rule would neither aid the argument or protect rights that cannot be protected herein.

(9) The "inadequacy of the attempts" to justify such application, the resultant denial to plaintiffs of a trial on the merits if applied, the availability of government attorneys in every district "point strongly to the conclusion that the superior officer should not be considered an indispensable party unless his active concurrence is required to effect the relief asked."[18]

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[17] 50 Yale L. J. 917. The reasons for the indispensability rule have also been defined as "rather tenuous justifications" and the added expense and inconvenience of bringing the action in Washington is thought often to result "in the denial of a right to trial upon the merits" (37 Columbia L. Rev. 142).

[18] 50 Harvard L. Rev. 801, 802.

C. The Nevada Court has jurisdiction to restrain petitioner.

1. ***This Court will not consider an alleged jurisdictional defect of a state court where the point was neither raised in the petition for certiorari nor presented to the court below.***

Petitioner's point that a state court lacks power to enjoin a federal officer was concededly not raised in the petition for certiorari or in the courts below (Pet. Br. 35, note 46; R. 31). This Court has repeatedly held that it will not consider questions not raised in the petition for certiorari.[1] Nor will it consider a question which petitioner failed to raise in the state court below.[2] These principles

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[1] *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Webster Electric Co.* v. *Splitdorf Elecrtical Co.*, 264 U. S. 463, 464; *Alice State Bank* v. *Houston Pasture Co.*, 247 U. S. 240; *Steele* v. *Drummond*, 275 U. S. 199, 203; *Olson* v. *United States*, 292 U. S. 246, 262; *Helvering* v. *Taylor*, 293 U. S. 507, 511; *Prudence Co.* v. *Fidelity & Deposit Co. of Maryland*, 297 U. S. 198, 208; *Johnson* v. *Manhattan Ry. Co.*, 289 U. S. 479, 494; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182; *Hubbard* v. *Tod*, 171 U. S. 474, 494.

[2] *Dewey* v. *Des Moines*, 173 U. S. 193, 197, 198; *Whitney* v. *People of State of California*, 274 U. S. 357, 362, 363; *People of State of New York ex rel. Rosevale Realty Co.* v. *Kleinert*, 268 U. S. 646, 650, 651; *Keokuk & Hamilton Bridge Co.* v. *Illinois*, 175 U. S. 626, 633; *Detroit, Ft. W. & B. I. Ry.* v. *Osborn*, 189 U. S. 383, 390, 391; *McGoldrick* v. *Compagnie Generale*, 309 U. S. 430 (1939), where this Court, upon certiorari to the Supreme Court of New York stated at p. 434: "But it is also the settled practice of this Court, in the exercise of its appellate jurisdiction, that it is only in exceptional cases, and then only in cases coming from the federal courts, that it considers questions urged by a petitioner or appellant not pressed or passed upon in the courts below. *Blair* v. *Oesterlein Co.*, 275 U. S. 220, 225; *Duignan* v. *United States*, 274 U. S. 195, 200."

apply even when the point raised is that the state court lacked jurisdiction. *Clark* v. *Willard*, 294 U. S. 211 (1934)[1]

The wisdom of this rule is well exemplified by the history of this case. Respondents' motion to remand[2] was presented at the same time as petitioner's motion to dismiss.[3] The petitioner had every opportunity at that time to present its novel contention that the state court in any event lacked jurisdiction to enjoin a federal officer. The same opportunity was present when the United States sued to enjoin the prosecution of this action in the state courts,[4] when petitioner appealed to the Supreme Court of Nevada,[5] and when he petitioned to this Court for certiorari.

Respondents' right to a construction of the Taylor Grazing Act should not now be defeated by such tardy suggestion, which we submit is without merit.

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[1] Wherein the point was raised initially in this Court that the jurisdiction was never present in the state court because the subject of the litigation had no situs in the State of Montana. This Court said: "The petitioner makes a point that the property or part of it subjected to the levy was not of such a nature as to have a situs in Montana or to be amenable to process issuing from her courts. No such point was made in the record of the proceedings in the court below. No such point was made in this court in the petition for certiorari to bring the case here for review. It will not be considered now. *Gunning* v. *Cooley*, 281 U. S. 90, 98; *Zellerbach Paper Co.* v. *Helvering*, 293 U. S. 172, 182; *Helvering* v. *Taylor*, 293 U. S. 507" (at 216).

[2] See *supra*, p. 7.

[3] *Dewar* v. *Brooks*, 16 F. Supp. 636, 637.

[4] *United States* v. *Dewar*, 18 F. Supp. 981.

[5] *Brooks* v. *Dewar*, — Nev. — ; 106 Pac. (2d) 755.

2. *A state court has jurisdiction to restrain petitioner's threatened tortious conduct in this case even though otherwise he be a Federal officer.*

It is elementary that although the jurisdiction of the Federal courts is derived from the Constitution the exercise of such jurisdiction is limited to the extent and purposes expressly fixed by Congress. (Art. III, Sec. 1, 2; *Osborn* v. *Bank of the United States*, 9 Wheat. 738; *Kline* v. *Burke Construction Co.*, 260 U. S. 226). Petitioner does not claim that Congress has vested the district courts with exclusive jurisdiction to entertain suits against federal officers. That Congress has permitted such jurisdiction to remain in the state courts in all proper cases is strongly indicated by statutory provision permitting removal to the Federal courts of suits against certain types of Federal officers. Such a statute is the "Force Act" (Jud. Code, sec. 3; 28 U. S. C. 76) and Article 117 of the Articles of War (10 U. S. C., Sec. 1589; 41 Stat. 811). The former permits such removal in actions against officers acting under the revenue laws, officers of a Federal court and members of Congress when sued for action taken under authority of their office. The latter applies to suits against military officers of the United States. Likewise, exclusive jurisdiction is given to the Federal courts in suits to enjoin enforcement of orders of the Interstate Commerce Commission. (Jud. Code, Sec. 208; 28 U. S. C. Sec. 46).

This Court has clearly indicated that there was left to the Courts of the respective states all jurisdiction which Congress did not exclusively vest in the Federal district courts, or which was not so vested by the constitution.[1]

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[1] Inferior federal courts have impliedly recognized a state court's jurisdiction to enjoin unauthorized conduct of a federal officer by

In *Teal* v. *Felton*, 12 How. 284 (1851) a local postmaster was sued for damages for refusal to deliver mail, the postmaster withholding it for lack of sufficient postage under certain claimed regulations. In spite of a plea to the jurisdiction, judgment was rendered for the plaintiff and the case eventually reached this Court where it was again claimed that the State Court had no jurisdiction. This Court affirmed the judgment and upheld the jurisdiction of the state Court, saying:

> "If then they (the posted matter) be wrongfully withheld for a charge of unlawful postage, it is a conversion for which suit may be brought. His right to sue existing, he may sue in any court having civil jurisdiction of such a case, unless for some cause the suit brought is an exception to the general jurisdiction of the court. Now the courts in New York having jurisdiction in trover, the case in hand can only be excepted from it by such a case as this having been made one of exclusive jurisdiction in the courts of the United States, by the Constitution of the United States. That such is not the case, we cannot express our view better then Mr. Justice Wright has done in his opinion in this case in the Court of Appeals. After citing the 2d section of

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holding that such injunction suits cannot be removed to a federal court unless a federal statute authorizes such removal. *Underwood* v. *Dismukes*, 266 Fed. 559 (D. C., R. I.) (suit to restrain naval officer from interfering with rights to remove sand); *City of Stanfield* v. *Umatilla River*, 192 Fed. 596 (C. C. D. Ore.); *Dewar* v. *Brooks*, 16 F. Supp. 636, (D. C. Nev.). And the fact alone that a defendant is a federal officer does not give the federal courts original jurisdiction over all suits against him or render suits in a state court against such officer removable to a federal court. *Ingram Day Lumber Co.* v. *U. S. Shipping Board*, 267 Fed. 283; *Ford Motor Co.* v. *Automobile Insurance Co.*, 13 F. (2d) 415; *McNally* v. *Jackson*, 7 F. (2d) 373.

> the 3d article of the Constitution, he adds, 'this is a mere grant of jurisdiction to the federal courts, and limits the extent of their power, but without words of exclusion or any attempt to oust the state courts of concurrent jurisdiction in any of the specified cases in which concurrent jurisdiction existed prior to the adoption of the Constitution. The apparent object was not to curtail the powers of the state courts, but to define the limits of those granted to the federal judiciary' " (12 How. 284, 292 [1851]).

Petitioner passes this case, as well as *Harris* v. *Dennie*, 3 Pet. 292, with the comment that the state courts doubtless have jurisdiction to entertain suits for damages against Federal officers. In principle, however, (applying petitioner's own criterion as to determining the nature of an action by the relief sought) there would seem to be an entire analogy between *Teal* v. *Felton*, *supra*, and such cases as *American School of Magnetic Healing* v. *McAnnulty*, 187 U. S. 94 (1902) where the postmaster was enjoined (in a Federal court) from unlawfully withholding delivery of mail under an unauthorized fraud order.

The harshest results would accompany a rule to the effect that in no event has a state court jurisdiction to entertain an injunction suit against a federal officer where equity requires that his rights be so protected. Such rule would deprive a large class of litigants of any remedy whatsoever. This class would include all persons suing to protect rights cognizable in equity when the matter in controversy is less than $3,000 in value.[1]

Again, in *Slocum* v. *Mayberry*, 2 Wheat. 1, (1817), which challenged the jurisdiction of a State court to entertain a

[1] For further discussion of this point see *infra*, p. 41.

replevin suit against a Federal surveyor of customs growing out of his alleged unlawful seizure of the cargo of a vessel, this Court said:

> "To what court can this appeal be made? The common-law courts of the United States have no jurisdiction in the case; they can afford him no relief. The party might, indeed, institute a suit for redress, in the district court, acting as an admiralty and revenue court; and such court might award restitution of the property unlawfully detained. But the act of congress neither expressly, nor by implication, forbids the state courts to take cognisance of suits instituted for property in possession of an officer of the United States, not detained under some law of the United States; consequently, their jurisdiction remains. Had this action been brought for the vessel, instead of the cargo, the case would have been essentially different. The detention would have been by virtue of an act of congress, and the jurisdiction of a state court could not have been sustained. But the action having been brought for the cargo, to detain which the law gave no authority, it was triable in the state court (2 Wheat. 1, 11 [1817]).

In commenting on this case the petitioner expresses the view that the decision "seems equally applicable to a bill for an injunction" but considers that, either because it was decided before the *habeas corpus* cases or because of its antiquity, it cannot be considered controlling at this date (Pet. Br. 40, note 51). Such attempted disposition of the force of the holding is not persuasive. The *habeas corpus* cases, as hereinafter pointed out, stand on a different basis. Early cases close to the formative period de-

fining the relation of the Federal to the state governments, particularly when they remain without adverse comment to the present, are entitled to a maximum rather than a minimum value. This is so particularly where the principle of such cases has been followed subsequently.[1]

In *Northern Pacific Railway Co.* v. *North Dakota*, 250 U. S. 135, the Court, while reversing the state court on the merits, upheld its jurisdiction in an action to enjoin the Federal Director General of the Railroads from enforcing intrastate rates made by the Interstate Commerce Commission under the "Railroad Control Act" of 1918 (40 Stat. 451). It is true, as noted by petitioner (Pet. Br. 39, 40, note 51), that the act contained a section waiving immunity from suit but the decision was not based upon such provision. In fact, the opinion, while quoting other parts of such section, does not refer to the immunity clause. The Court, following the same line of reasoning in *Teal* v. *Felton, supra,* and *Slocum* v. *Mayberry, supra,* said:

> "* * * The relief afforded against the officer of the United States proceeded upon the basis that he was exerting a power not conferred by the statute, to the detriment of the rights and duties of the state authority, and was subject therefore to be restrained by state power within the limits of the statute. Upon

[1] *Drury* v. *Lewis*, 200 U. S. 1 (prosecution for murder); *Buck* v. *Colbath*, 3 Wall. 334 (trespass against marshal); *Maryland* v. *Soper*, 270 U. S. 36 (perjury by prohibition officer); *Scranton* v. *Wheeler*, 179 U. S. 141 (ejectment by riparian owner); *Stanley* v. *Schwalby*, 147 U. S. 508 where, upon appeal, from an action to try title in a Texas state court, this Court held that the state court was not ousted of jurisdiction by the defendants' plea that they acted as officers of the United States.

the premise upon which it rests, that is, the unlawful acts of the officers, the proposition is undoubted * * *" (at 151).

As a matter of logic and legal analysis there should be no doubt whatsoever as to the power of the state court herein. Where suit is brought in a State court to restrain a Federal officer from acting in respects allegedly unauthorized, the injunction would operate against him only as an individual and not as a Federal officer; otherwise the case must be dismissed as one against the United States. (*Supra*, p. 13 et seq.). The injunction if granted would not restrain Federal functions. On the filing of such suit it should not be dismissed as a suit against the United States unless the contentions concerning the want of power in the officer are so unsubstantial and frivolous as to afford no basis for jurisdiction and hence to cause the suit to be from the beginning directly against the United States. *Northern Pacific Railroad Company* v. *North Dakota, supra*, at 152.

Petitioner's cases limiting state court jurisdiction distinguished.

The cases cited by petitioner wherein the jurisdiction of the state court was successfully challenged are clearly distinguishable and their principle should not be extended hereto. They comprise the following groups:

The *habeas corpus* cases. These are *Ableman* v. *Booth*, 21 How. 506, and *Tarble's* case, 13 Wall 397. In each of these cases the denial of State court power was predicated upon the impotence of the Federal Government to enforce its criminal code if every arrest by a Federal of-

ficer was subject to nullification by habeas corpus of a hostile sovereign. "If the judicial power exercised in this instance has been reserved to the States, no offense against the laws of the United States can be punished by their own courts, without the permission and according to the judgment of the courts of the State in which the petitioner happens to be imprisoned". *Ableman* v. *Booth, supra,* at 514, the *Tarble's* case, *supra,* at 403. The extensive reference by the court to the chaotic conditions that would result if its criminal process were subject to interference by State courts throughout the nation justifies our characterization of these cases as being *sui generis.*

In the *Ableman* case the petitioner had been found guilty in a Federal District Court for violating the Federal fugitive slave law, after which conviction the State court had released him for its unconstitutionality. *Ibid,* p. 510. In the *Tarble's* case the prisoner was awaiting trial for desertion from the army but claimed he had been illegally mustered in because parental consent had not been secured to his enlistment as a minor. (*Tarble's* case, at 399).

Petitioner claims that Tarble's case (although admittedly criminal) has anticipated the fact that the injunction will not restrain a Federal officer since it will be issued only if he lacks authority. But a significant fact in Tarble's case was that the alleged jurisdictional fact (lack of parental consent when the minor was mustered into the army) did not prevent the minor from becoming a soldier and subject to the military law upon desertion, for which charge he was being held by the military authorities. The determination of the jurisdictional fact in his favor would not necessarily have released him from trial for desertion.

The principle of *Tarble's* case seems to be definitely limited by the converse situation in *Drury* v. *Lewis*, 200 U. S. 1, wherein the discharge of a writ of *habeas corpus* by a federal court was affirmed by this Court where an army officer had been indicted in a state court for murder arising out of his attempt to apprehend a person suspected of stealing government property. This Court held that "even though it was petitioners' duty to pursue and arrest Crowley (assuming that he had stolen pieces of copper)," the state court had the power to determine the jurisdictional fact, which, if decided one way, would have exonerated petitioner for an act done in course of federal duty, or decided contra, would have held him for murder. "* * * it was for the state court to pass upon it, and its doing so could not be collaterally attacked."

The mandamus cases: These cases, such as *McClung* v. *Silliman*, 6 Wheat. 598, are also distinguishable. We are not in accord with petitioner's explanation that writs of mandamus and injunction differ only in form (Pet. Br. 37). The premise of a writ of mandamus is that the defendant is a federal officer and not only has the power but that it is his duty to perform the act in question; the premise of a writ of injunction, as in this case, is that the defendant lacks any power as a federal officer. The issuance of a writ of mandamus out of a state court directed to a federal officer would result, if obeyed, in the performance of the functions of the Federal Government by decree of state courts rather than by federal law and regulation.

The tax case: This is *Keely* v. *Sanders*, 99 U. S. 441; Pet. Br. 37. We agree with petitioner that "this case may be distinguished upon the traditional reluctance to re-

strain the collection of federal taxes" (Pet. Br. 37). And although "its statement is cast in terms of a principle of general application," (*ibid*) such statement it is respectfully submitted is obiter since the injunction of the state court was not violated for the "sale did not disturb any possession which the state court had of the property," (99 U. S. at 442), and proof was both sparse and incompetent that the property sold for federal taxes ever was under the jurisdiction of that court. (*ibid.*)

We submit that if the question of the power of a state court to restrain a federal officer acting without legislative authority be novel in this Court, that the reasoning of *Teal* v. *Felton, supra, Slocum* v. *Mayberry, supra,* and *Northern Pacific Railway Co.* v. *North Dakota, supra,* be extended and applied to the present question. The *Northern Pacific* case may indeed be controlling. The habeas corpus, mandamus, and tax cases are *sui generis* and should not be extended.

Congressional action in raising the value of the matter in controversy necessary for jurisdiction in the Federal District Courts, even though a federal question be involved (Jud. Code, Sect. 24; 28 U. S. C. 41 [1]), from 500 to 2000 and then to 3000 dollars (1 Stat. 73; 24 Stat. 552; 25 Stat. 433; 36 Stat. 1091) exhibits its intention not to curtail jurisdiction of state courts in matters wherein they have concurrent jurisdiction with the Federal District Courts. A ruling denying the state court jurisdiction in this case would mean that *no* injunction suit could ever be filed in a State court against a Federal employee however patent his lack of authority. Since the defect of the State court jurisdiction would be constitutional, we do not comprehend the significance of petitioner's comment (Pet. Br.

42) that the remedy for such evil lies with Congress, unless the inference is that Congress should eliminate the jurisdictional amount. The harshness of such a rule would leave a litigant without remedy in both State and Federal court if the matter in controversy for which protection was sought amounted to less than $3000. If Congress should further enlarge the jurisdictional minimum, the class without remedy would be increased.

II.

THE SECRETARY OF THE INTERIOR LACKED AUTHORITY UNDER THE TAYLOR GRAZING ACT TO ADOPT THE REGULATIONS OF MARCH 2, 1936 IN THE RESPECTS COMPLAINED OF, AND CONGRESS HAS NOT SUBSEQUENTLY RATIFIED THE UNAUTHORIZED ASSERTION OF AUTHORITY.

Petitioner does not dispute that the regulations of March 2, 1936 do not fulfill the conditions established by Congress in Section 3 of the Taylor Grazing Act which the respondents contend must be conformed with any licensing system set up under that Act.[1] Petitioner does not and has never attemped to square these regulations or the temporary revocable licenses thereunder with the requirements of Section 3 of that Act which respondents allege have been wholly disregarded. These respects are:

(1) The temporary licenses expressly state that they are temporary and revocable without any qualifications or restrictions upon such right of revocation, whereas

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[1] The Act (June 28, 1934, c. 865, 48 Stat. 1269; 43 U. S. C. 315) is printed at R. 15-23. Pertinent provisions of the "Rules for Administration of Grazing Districts" (herein referred to as the Rules of March 2, 1936) are found at R. 23-27.

Section 3 provides that permits "shall be for a period of not more than ten years, subject to the preference right of the permittees to renewal in the discretion of the Secretary of the Interior * * *" (See Complaint, par. 14(e), R. 9, 10).

(2) The grazing fees provided for by the Rules of March 2, 1936 are uniform throughout the entire area subject to the Act, whereas Section 3 provides that "the Secretary of the Interior is hereby authorized to issue * * * permits * * * upon the payment annually of reasonable fees in each case to be fixed or determined from time to time" (See Complaint, par. 14(d) R. 8, 9).

(3) Since the licenses are temporary and revocable, licensees are denied the benefit of those provisions of Section 3 which provides that:

(a) "No permittee complying with the rules and regulations laid down by the Secretary of the Interior shall be denied the renewal of such permit, if such denial will impair the value of the grazing unit of the permittee, when such unit is pledged as security for any bona fide loan."[2] (See Complaint, par. 14(f), R. 10.)

(b) "That nothing in this Act shall be * * * administered in any way to diminish or impair any right to the possession and use of water for mining, agriculture, manufacturing, or other purposes which has heretofore vested or accrued under existing law validly affecting the public lands or which may be hereafter initiated or acquired and maintained in accordance with such law." (See Complaint, par. 14(g), R. 10.)

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[2] This provision is sometimes referred to as the McCarran amendment.

A. The Supreme Court of Nevada correctly held that any permit or license system for grazing under the Taylor Act must conform with the limitations of Section 3 thereof.

The Supreme Court of Nevada decided that "nothing has been presented in this case which would justify us in going further and holding that, regardless of and contrary to the provisions of Section 3, the fees could legally be based upon the uniform rate prescribed by the Rules of March 2, 1936, or that any part of said Rules can be held valid if inconsistent with that Section or any other provisions of the Grazing Act" (R. 57). Respondents submit that this interpretation is correct.

1. *The Legislative History of the Act Establishes a Legislative Intent that any Licensing System must Conform with the Requirements of Section 3.*

We do not dispute that if the Taylor Act contained only Section 2 and omitted Section 3, the Secretary of the Interior would have had authority thereunder to establish a licensing system similar to that set up by the Department of Agriculture for forest lands under the Forest Reserve Act of 1897 (Sec. 1, 30 Stat. 35, 16 U. S. C. Sec. 551). *United States* v. *Grimaud*, 220 U. S. 506. Section 2 of the Taylor Act has some similarity in language and structure with Section 1 of the Forest Reserve Act.

The significant and controlling feature of the Taylor Act as to licensing is the enactment of Section 3 containing a complete pattern for any licensing system to be instituted under the Act. We do not know whether Congress intended that licensing power should issue solely from Section 3. The reports of the Public Lands Committees

of both Houses at the time of its enactment appear to have so construed it.[1] It is noteworthy that petitioner makes no reference to any legislative proceeding whatsoever which states expressly that any licensing power issues under Section 2. But we do know and assert that it was the intention of Congress, manifestly expressed, that any licensing power when exercised must conform with the requirements of Section 3.

The Taylor bill is the culmination of agitation and abortive legislation for over forty years to provide for the orderly use, improvement and development of the public range which had not been otherwise appropriated.[2] Predecessor bills merely gave the Secretary of the Interior a general power to make regulations similar to that exercised by the Secretary of Agriculture in his domain.[3] Such bills failed because, as stated by Representative Taylor, "*many people are not willing to give just carte blanche provisions of that kind in the bill. They, with some justification, feel that there are some things that they should*

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[1] See H. Rep. 903, 73rd Cong., 2nd Sess., pp. 2, 3, 7; S. Rep. 1528, *ibid.*, pp. 2, 3, 5. The Senate report, in summarizing the bill states that "the specific purposes of the bill are enumerated in its title *and repeated in Section 2*, and are as follows: * * *" Then, summarizing each of the subsequent sections of the bill, the report states, obviously referring to Section 3, that "it comprehends the issuance of permits to graze livestock on such grazing districts to bona fide settlers, residents and other stockholders * * *" (at 2, 3).

Intrinsic evidence of such intention, in addition to the comprehensiveness of the provisions of Section 3, is its provision that "the Secretary of the Interior is *hereby* authorized to issue * * * permits".

[2] S. Rep. 1258, 73 Cong., 2nd Sess., p. 2. *Omacchevarria* v. *Idaho*, 246 U. S. 343, 346.

[3] An example is H. R. 4541, 72nd Cong., 1st Sess.

specifically provide for or reserve in the law itself for their guaranty."[4]

The first predecessor bill which follows the formula of the Taylor Act in limiting the Secretary's authority as to licensing was introduced by Representative French.[5] Its Section 3 appears to be the embryo of Section 3 of the Taylor Act. The French bill was supplanted by the Colton bill in the same session.[6] The latter, having been reintroduced in the succeeding Congress, finally became the Taylor Act.[7] Representative Taylor has testified that his bill is "a composite outgrowth of many years' consideration by former Congressman Colton of Utah; French

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[4] 78 Cong. Rec., Pt. V, p. 5372; hearings, H. Com. on Public Lands on H. R. 2835, 73rd Cong., 1st Sess. and H. R. 6462, 73rd Cong., 2nd Sess., p. 74; Opinion below, R. 54.

Mr. Taylor's remarks in full are as follows: "Returning to the bill before us I may say this bill originally started with about a dozen lines, just putting all this public domain under the jurisdiction of the Interior Department, to be administered for the general welfare of the Government and for the public good. But we have been adding to it all the time until now the bill contains 10 pages, consisting quite largely of just unnecessary regulations written into the bill. The Secretary could do practically everything that is provided for in the bill if we had simply turned it over to him. Nearly all these things could be provided for by regulations. However, many people are not willing to just give carte blanche provisions of that kind in the bill. They, with some justification, feel that there are some things that they should specifically provide for or reserve in the law itself for their guaranty.* * *"

[5] H. R. 8822, 72nd Cong., 1st Sess.

[6] H. R. 11816, 72nd Cong., 1st Sess. Sections 2 and 3 of the Colton bill were similar in form and substance to the Taylor Act.

[7] H. R. 2835, 73rd Cong., 1st Sess., and H. R. 6462, 2nd Sess. The latter eliminated Section 13 of the former. The House Committee on Public Lands held simultaneous hearings on both bills and favorably reported on H. R. 6462 with amendments. H. Rep. 903, 73rd Cong., 2nd Sess., pp. 1, 5.

of Idaho, Sinnott of Oregon; Evans and Leavitt of Montana; myself and several other western congressmen."[8]

Between the introduction of the Taylor bill in the 73rd congress and its enactment, further limitations were written into Section 3 as to any licensing system to be established,[9] "largely to insure the more complete protection of those now enjoying the use of the public land."[10]

The legislative history of the Act discloses also the particular purposes sought to be achieved by the provisions and amendments to Section 3 which respondents are now seeking to preserve.

An object of the bill, stated in its preamble, is "to stabilize the livestock industry dependent on the public range." Section 3 was designed to accomplish this in part by providing qualified stockmen with some certainty of tenure. Mr. Taylor, who envisaged that the administration of his act under the Department of the Interior would

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[8] Hearings, H. Com. on Public Lands on H. R. 2835 and 6462, 73rd Cong., 2nd Sess., p. 68.

[9] These amendments in substance provided: (1) for preference in issuance of grazing permits to designated groups, (2) that a renewal of a permit shall not be denied a permit holder if the denial will impair the value of the grazing unit of the permittee when the unit is pledged as security for a bona fide loan (the McCarran Amendment), (3) that the Act shall not be construed or administered to impair any water rights which have vested or accrued under existing law; (4) grazing privileges recognized and acknowledged shall be adequately safeguarded, but the issuance of permits shall not create any right, title or interest in and to the public lands. (See Hearing, *ibid.*, p. 195; S. Rep. 1258, 73rd Cong., 2nd Sess. p. 9).

Other limitations in the bill as introduced were preserved, namely: (1) that the permits be for a period of years, not more than ten; (2) that the permits may be issued "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time".

[10] S. Rep. 1258, *ibid.*, p. 9.

parallel the administration of the Department of Agriculture under the Forest Reserve Act, testified:[11]

> "It tends to stabilize the stock raising industry. At the present time, there is no such thing as a stabilized industry on the range. A man does not know whether he can graze his stock anywhere on the range next year, or not. There is no allotment to him of a specific piece of ground that he may graze his stock upon, and that is very necessary for the development and stabilization of the livestock industry * * *. They (the Department of Agriculture) give ten-year permits. They do give them permits, and they know in advance that they will get the permit. They know in advance where they must keep their stock * * *."[12]

Contrary to such intention, Director of Grazing Carpenter has testified, subsequent to the adoption of the rules in question, that a temporary license is "subject to cancellation almost at any moment and (is) not a valuable asset in a stabilized business * * *."[13]

The clause in Section 3 which requires the payment annually "of reasonable fees, in each case to be fixed or determined from time to time," was designed so that

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[11] Hearings, *ibid.*, pp. 26, 30.

[12] In recommending passage of the Taylor Act, Secretary of the Interior Ickes wrote the House Committee on Public Lands that "* * * those engaged in the livestock industry have no certainty of tenure in their grazing use of the public lands. This situation seems now to be thoroughly realized both by local organizations and individuals interested in the livestock industry and by Congress" (H. Rep. 903, 73rd Cong., 2nd Sess. p. 7); for similar opinions of Secretary of Agriculture Wallace and Secretary of the Interior Wilbur, see H. Rep. 903, 73rd Cong., 2nd Sess., p. 11; H. Rep. 1719, 72nd Cong., 1st Sess., p. 5.

[13] Hearings, Sub-Committee of House Committee on Appropriations, H. R. 10630, 74th Cong., 2nd Sess., 1936, p. 14.

licensed stockmen would pay fees that are to some degree at least commensurate with the value of the forage.

Mr. Colton's bill[14] had provided for the payment annually "of reasonable fees to be fixed or determined from time to time under his authority." Chief Forester Stuart, who had helped draft that bill, testified on the great difference in grazing value of lands subject to it and, after commenting on the economics of the livestock industry, concluded that "this illustrates the need of complete coordination of fees based upon the actual value to the permittees * * *."[15] When the bill was favorably reported, the provision as to fees was amended by inserting the words "in each case," further to insure that the fees to be paid would be commensurate with the value of the forage.[16] Such also is the language of the Taylor Act.[17]

During the hearings on the Taylor Act, the Department of the Interior introduced evidence, based on surveys of the Geological Service, as to the acreage by states of vacant, unappropriated land, and its annual lease value for grazing purposes.[18] 29% of the total vacant unreserved public land is located in Nevada. Of over 50 million acres of public domain in Nevada, over 35 million acres (or about 70% of it) are less-than 1-cent

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[14] H. R. 11816, 72nd Cong., 1st Sess.

[15] Hearing, H. Com. on Public Lands, H. R. 11816, 72nd Cong., 1st Sess., p. 6.

[16] *Ibid.*, p. 151.

[17] The uniform fee basis "cannot be reconciled with the idea of 'reasonable fees in each case to be fixed or determined from time to time'". Opinion below, R. 56; *United States* v. *Achabal*, 34 F. Supp. 1.

[18] See table and map, Hearings, Sen. Com. on Public Lands, 73rd Cong., 2 Sess., H. R. 6462, pp. 49, 50; Hearings, House Comm. on Public Lands, *ibid.*, pp. 85-87; see complaint pars. 6, 10, 14(d), R. 4, 6, 8.

land,[19] i. e. the use value of which for grazing purposes is less than 1-cent an acre per year. 15 million acres are 1 to 2 cent land. *It has no 2 to 3 cent land.* Of Montana's 6 million acres of public domain, over half is 2 to 3 cent land, *and it has no less than 1-cent land.* Of New Mexico's 13 million acres, about a fifth is 2 to 3 cent land. Of Oregon's 13 million acres, 10 million acres are 1 to 2 cent land, over a million less-than 1-cent land, and over a half million acres 2 to 3 cent. Three-fifths of Utah's 25 million acres of public domain is less-than 1-cent land. Further comparison is unnecessary to show the disparity in grazing value of the lands subject to the Act.

Two courts in the course of this litigation have recognized judicially this disparity. In *United States v. Achabal* (wherein collection of grazing fees is being sought against the respondents herein despite the pendency of this suit) Judge Norcross considered this situation as one of common knowledge, saying:

> "The determination of a 'reasonable fee in each case' is clearly a matter which may not be covered by any general rule. Grazing areas vary materially in value. Twice the area in one section may be required to supply the same number of cattle or sheep

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[19] The less-than-one cent land was estimated by the Geological Service to carry less than an average of eight animal units, and the one-to-two cent land between eight to fifteen animal units per square mile. Both categories are classified as "too poor" for stock raising. The two-to-three cent land was estimated to carry an average of more than fifteen animal units per square mile, and is classified in "too poor in part" for stockraising classification. (Hearings, Sen. Com. on Public Lands on H. R. 6462, 73rd Cong., 2nd Sess., p. 50.)

The grazing fees under the Rules of March 2, 1936, are on a different rental or fee basis. They are on a per head per month basis, regardless of acreage.

than in another section some distance therefrom. The larger area required for a given number of grazing stock may also affect the cost of herding and because of a larger area to be covered by the ranging stock may occasion some material difference in animal weight at the close of the grazing season. Manifestly it was for reasons of this character that the statute provided for a determination of a 'reasonable fee in each case.'" (*United States* v. *Achabal*, 34 F. Supp. 1, 3 [D. C. Nev.].)

The Supreme Court of Nevada wrote:

"The idea of fees determined on the basis of uniform rates for live stock grazing on the millions of acres of public range land scattered throughout eleven western states, without taking into consideration the different conditions to be found in various portions of this vast domain, cannot be reconciled with the idea of 'reasonable fees in each case to be fixed or determined from time to time.' It is a matter of common knowledge among the stock men of the far western states that the best rates on grazing fees in the national forest are not the same in every national forest, either for cattle or sheep" (R. 56).[20]

[20] Petitioner's statement (Pet. Br. 50) that "the temporary rates, (5c per month for each head of cattle and 1c per sheep) are regarded by the Department of the Interior as far below the actual value of the public range, and hence certain not to be unreasonable, in any particular case", is not germane to the issue and is completely *dehors* the record. Had petitioner answered the complaint, quaere whether such ex parte opinion would have been admissible even as evidence.

Petitioner elected to stand on his demurrer and the decree recites that "each and all of the allegations of the complaint of plaintiffs are taken as confessed and true" (R. 34, 56). The complaint contains such allegations of fact as to the economics of the respondents' livestock business in Nevada Grazing District No. 1 as to establish the inapplicability of the uniform fee as to them (Pet. Par. 6, 10, 14(d), 17(c); R. 4, 6-9, 12).

The legislative history of the Act thus shows a Congressional intent that the conditions of Section 3 must be conformed with in any licensing system, and that those conditions which respondents assert have been ignored secured particular Congressional emphasis.

2. *The Subsequent Unsuccessful Attempt by the Department of Interior to have Repealed a Provision in Section 3 Confirms the Original Legislative Intent.*

In the session of Congress following the enactment of the Taylor Act, but a year before the promulgation of the Rules of March 2, 1936, the Department of the Interior unsuccessfully attempted to have repealed that portion of Section 3 which provides that permits are to be renewed if a denial of renewal will impair the value of the grazing unit when such unit is pledged as security for a bona fide loan (the McCarran Amendment). This provision is now the principal target of petitioner's attack as making inflexible the administration of the Act under Section 3 (Pet. Br. 45).

But when the Secretary of the Interior forwarded his request for repeal, he did not *then* represent to Congress that he was finding administration of the Act pursuant to Section 3 impractical, but he represented that "this provision, as applied to grazing permittees is discriminatory and highly unfair as it, in effect, rewards permittees who continue liens on their grazing units and penalizes those who discharge their obligations."[21]

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[21] House Rep. 479 to accompany H. R. 3019, 74th Cong., 1st Sess., p. 4.

In the most conclusive manner, the repeal amendment was defeated.[22] Such action establishes with finality a Congressional intention that the limitations of Section 3 must not be disturbed. Unsuccessful with repeal, the Department evidently decided to ignore it.

3. *Respondents' Interpretation of the Relation Between Sections 2 and 3 of the Act Follows the Precedent of This Court.*

Respondents submit that the provisions of the Taylor Act in question are so clear and their meaning so plain that no difficulty attends their construction. Adherence to the terms of Section 3 does not lead to an impossible or an unreasonable result. (*Infra*, p. 56.) We are bound by the enactment as the final expression of the meaning intended. (*U. S. v. Mo. Pac. R. R. Co.*, 278 U. S. 269, 277, 278 [1928]).

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[22] The House Committee on Public Lands recommended the elimination of the repeal provision. (H. R. 479 to accompany H. R. 3019, 74th Cong., 1st Sess. pp. 2, 3). The House, after debate, reinserted it. (Cong. Rec. Vol. 79, Pt. 7, 74th Cong., 1st Sess., pp. 8104-8107.) The Senate Committee on Public Lands struck out the repeal provision and reported that "after hearing testimony upon the subject, concluded that it would be advantageous to permit this section to remain, and, consequently, disagreed with the House in this particular". (Sen. Rep. 1105 to accompany H. R. 3019, 74th Cong., 1st Sess., p. 3.) In conference, the House receded so that, as passed, Section 3 of the Taylor Act was not disturbed. (Cong. Rec., Vol. 79, Pt. 13, 74th Cong., 1st Sess., p. 14013.)

The spokesman for the Department of the Interior stated that "that provision (sought to be repealed) has been the subject of more contention that any provision in the act * * * I will state this for the record: I personally see no objection to the language of this provision which was deleted. I have never held the fears for it that many other people have * * *." (Hearings, Sen. Comm. on Public Lands, S. 2539, 74th Cong., 1st Sess., pp. 79, 80.)

The Secretary of the Interior has acted as if the act did not contain Section 3, but significance must be given it in its entirety. (*Ex parte Public Bank*, 278 U. S. 101, 104). This Court has often announced that where an act contains both general and specific provisions relating to a particular subject, it is a rule of construction that follows the dictates of common sense that Congress intended that the more particular provisions expressed its intention, even though the general provisions standing alone might be broad enough to include the subject to which the more particular provision relates. *Townsend* v. *Little*, 109 U. S. 504, 512; *United States* v. *Nix*, 189 U. S. 199; *Kepper* v. *United States*, 195 U. S. 100, 125; *Petri* v. *Creelman Lumber Co.*, 199 U. S. 487; *Swiss Insurance Co.* v. *Miller*, 267 U. S. 42; *Ginsberg & Sons, Inc.* v. *Popkin*, 285 U. S. 204, 208; *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269. The legislative history of Sections 2 and 3 confirm the practicality of this rule of construction and warrants its application in the premises.

4. *Petitioner's Defense of the Regulations Answered.*

Petitioner defends the assertion of power under Section 2 on three grounds: that the language of Section 2 is allegedly mandatory, whereas the language of Section 3 is allegedly permissive (Pet. Br. 47, 48); a plea of necessity that obedience to the provisions of Section 3 would make difficult the administration of the Act in its infancy (Pet. Br. 44-47); that an administrative construction which is within the language of the statute should not lightly be disturbed by the courts (Pet. Br. 51).

Petitioner's first argument fails to notice that the language of Section 3 is in terms as imperative as the language of Section 2. Section 3 does not order the Secretary of the Interior to institute a licensing system. It authorizes him to do so but requires that when he so acts, he *shall* abide by the provisos therein. Each of the limitations and provisos in Section 3 is in such imperative language.[23]

Nor would the so-called "mandatory" provisions of Section 2 ever be in effect unless the Secretary should first elect to establish grazing districts under the provisions of Section 1, "authorizing" him "in his discretion" to do so. Thus, Section 2 is no more mandatory than Section 3.

As to petitioner's plea of impracticality in instituting a licensing system conformable with the requirements of Section 3, respondents' only answer is, if such plea is well founded in fact, that "inconvenience or hardships, if any, that result from following the statute as written must be relieved by legislation." (*U. S.* v. *Mo. Pac. R. R. Co.*, 278 U. S 269, 277) The Department's efforts to repeal a provision of Section 3 are in this connection entitled to great significance (*Supra*, p. 52).

Although they criticized the Taylor Act in course of enactment in other respects, neither the Secretary of the Interior nor the Secretary of Agriculture, the latter with extensive experience of his Department under the Forest Reserve Act, criticized any prospective inflexibility under

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[23] When the Taylor Act was in process of enactment the Department of the Interior, in summarizing the bill, did not distinguish between types of authority conferred by Sections 2 and 3. Although not so expressly stated, the Department appears to have considered Section 2 as a general enabling clause and that Section 3 dealt with the subject of licensing. See H. R. 903 to accompany H. R. 6462, 73rd Cong., 2nd Sess. p. 7; Sen. R. 1182, *ibid.* p. 5.

Section 3;[25] nor, so far as respondents can ascertain, was any amendment ever suggested in the extensive hearings on the Taylor Act and its predecessor bills such as respondents now seek to make by judicial construction.

In Section 3 Congress has provided wide flexibility and discretion in the Secretary of the Interior to meet the practical difficulties that could be expected to arise in the administration of the Act. Section 3 does not order the Secretary of the Interior to institute a licensing system. Permits were to be issued to such as "under his rules and regulations" are entitled to participate in the use of the range. Unless the permittee has pledged his ranch for a bona fide loan, permits are to be renewed "in the discretion of the Secretary of the Interior." The Secretary is to "*specify from time to time numbers of stock and seasons of use.*"[26] Thus in vital matters affecting the use and protection of the public range the Secretary appears to have sufficient latitude under Section 3 to have instituted a licensing system conformable with its provisions, and flexible as to experience and the hazards of nature.

After approximately seven years of administration, it seems strange that the Department should have insufficient data to establish a licensing system conformable with the flexible requirements of Section 3. The General Land Office and the Geological Service have been operating for many years. Respondents have not compiled a bibliography of surveys and studies as to public range but notice that the public domain in Nevada has been recently and

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[25] See House Rep. 903 to accompany H. R. 6462, 73rd Cong., 2nd Sess., pp. 7-11; Senate Rep. 1182, *ibid*, pp. 4-9.

[26] Applying, as this does, to term permits, it affords complete control and flexibility, when properly applied.

comprehensively mapped out and analyzed by the Department of Agriculture[27] and the State of Nevada is constantly engaged in such work.[28]

Promises to institute a licensing system in the indefinite future conformable with Section 3 cannot be substituted for rights assured by Congress which administrative officials are charged with preserving. Meanwhile the stabilization of the livestock industry dependent on the range —one of the express purposes of the Taylor Grazing Act (R. 15)—is not being accomplished.

An administrative interpretation of an act is entitled to serious consideration by a court when it has become long established and when it relates to an ambiguous statute, that is, when either of two interpretations will be entirely consistent with its provisions.[29] Neither condition

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[27] "The Public Domain of Nevada and Factors Affecting Its Use", Dept. of Agriculture, Technical Bulletin #301, April, 1932. See particularly its bibliography.

[28] See, for example, biennial reports of the State Engineer of Nevada; publications of the Agricultural Experimental Station, University of Nevada, such as Bulletin #133, September, 1933, "The Main Reasons Why Range Cattle Ranches Succeed or Fail" (an economic analysis of ranching in Nevada); Bulletin #139, March, 1935, "The Public Range and the Livestock Industry of Nevada".

[29] *United States* v. *Missouri Pacific R. R. Co.*, 278 U. S. 269, 280 (1928); *Iselin* v. *United States*, 270 U. S. 245, 251 (1926); *Louisville and Nashville R. R. Co.* v. *United States*, 282 U. S. 740, 775 (1931).

This Court has said:

> "* * * It has been held in many cases that a definitely settled administrative construction is entitled to the highest respect; and, if acted on for a number of years, such construction will not be disturbed except for cogent reasons. See e. g. *Logan* v. *Davis*, 233 U. S. 613, 627. But the court is not bound by a construction so established. *Chicago Etc. Ry. Co.* v. *McCaull-Dinsmore Co.*, 253 U. S. 97, 99. *United*

is herein fulfilled and an administrative interpretation can never be employed to override the express provisions of a statute or to create authority where there is none.

The Department of the Interior has vested itself with additional statutory power merely by exercising such power. This Court has observed that "the only power conferred, or which could be conferred, by the statute is to make regulations to carry out the purpose of the Act—not to amend it." (*Miller* v. *United States*, 294 U. S. 435, 440).

B. Congress has not ratified the unauthorized regulations.

1. *The "Appropriation" Acts cannot be so construed.*

Petitioner first claims that "the appropriation of money for range improvements on the basis of fees collected in the several grazing districts (25% of the estimated $1,000,000 revenue to be derived from temporary licenses) constitutes a ratification of the temporary license and fee system inaugurated by the Department pursuant to Section 2 of the Act (Pet. Br. 53). This was not a general appropriation for the enforcement or administration of the licensing system. Congress was under its own statutory duty under Section 10 of the Taylor Act to make

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States v. *Dickson*, 15 Pet. 141, 161. The rule does not apply in cases where the construction is not doubtful. And if such interpretation has not been uniform, it is not entitled to such respect or weight, but will be taken into account only to the extent that it is supported by valid reasons. *Brown* v. *United States*, 113 U. S. 568, 571. *Merritt* v. *Cameron*, 137 U. S. 542, 551-552. *United States* v. *Alabama Railroad Co.*, 142 U. S. 615, 621. *United States* v. *Healey*, 160 U. S. 136, 145. *Studebaker* v. *Perry*, 184 U. S. 258, 268. *Houghton* v. *Payne*, 194 U. S. 88, 99." (*United States* v. *Mo. Pac. R. Co.*, *supra*, at 280).

the appropriation, so that its action implies no voluntary, affirmative recognition of the illegality, even if adequate disclosure had been made to Congress.

Section 10 of the Taylor Act provides that—

> "* * * all moneys received under the authority of this Act shall be deposited in the Treasury of the United States as miscellaneous receipts, but 25 per centum of all moneys received from each grazing district during any fiscal year is hereby made available, when appropriated by the Congress, for expenditures by the Secretary of the Interior for the construction, purchase or maintenance of range improvements * * *."

The Appropriation Act of June 22, 1936 (c. 691, 49 Stat. 1757, 1758), which is typical of those subsequent[1] carries out the directions in Section 10. It provides:

> "For construction, purchase and maintenance of range improvements within grazing districts pursuant to the provisions of Sections 10 and 11 of the Act of June 28, 1934 (48 Stat. p. 1269), and not including contributions under Section 9 of said Act, $250,000: *Provided*, That expenditures hereunder in any grazing district shall not exceed 25 per centum of all moneys received under the provisions of said Act from such district during the fiscal years 1936 and 1937."

The action of Congress in fulfilling its obligation to appropriate can be construed only as an intention to fulfill that duty.

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[1] The four subsequent acts are substantially the same as the Act of 1936. They are: Act of August 9, 1937, c. 570, 50 Stat. 565; Act of May 9, 1938, c. 187, 52 Stat. 291, 292; Act of May 10, 1939, c. 119, 53 Stat. 685, 687; Act of June 18, 1940, c. 395, Pub. No. 640, 76th Cong. 3rd. Sess.

The fictitious basis for the alleged ratification is revealed by the debates in Congress on the appropriation bill in 1936. (See Pet. Br. 53, notes 67, 68). They show neither discussion nor knowledge that the funds were to come from temporary licenses under Section 2 rather than term permits conformable with Section 3. In fact, the rules of March 2, 1936 were not promulgated for more than a month after the House acted on the "appropriation."[2] The Senate was similarly ignorant of the nature of the regulations which it is alleged to have "ratified."[3]

None of the six cases cited by petitioner is precedent in the premises. In four of them Congress, in subsequent legislation, *specifically referred to and identified* the order or regulation in dispute and took action which *affirmatively indicated its legality*. In the remaining two, the Court found that the assertion of authority was valid when exercised, and the facts as to ratification are too inapposite to be helpful.

Thus, in *Hamilton* v. *Dillin*, 21 Wall. 73 (1874), Pet. Br. 55, Congress ordered that all moneys collected "under the rules and regulations * * * dated, respectively, the 28th of August, 1862, 31st of March and 11th of Septem-

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[2] 80 Cong. Rec. Pt. II, p. 1274, 1936.

[3] Senator Hayden, the member of the Appropriations Committee who was in charge of the bill, was asked as to "the amount, if any, which will be received from stockmen who obtain *permits*". He replied:

> "Mr. President, the only information I have on that subject is that about 6 weeks ago a conference was held in the Senator's home city of Salt Lake between representative stockmen from the entire West and officials of the Division of Grazing Control to determine just exactly what the rates should be. Whether or not such rates have been promulgated, and how much money they will produce, I do not know." (80 Cong. Rec. Pt. III, p. 3026 [1936].)

ber, 1863 * * * be turned over to the Treasury." The Supreme Court said:

> "Here the regulations in question are referred to by name and date, and the money accruing under their operation (the great bulk of which was derived from the bonus on cotton) was directed to be paid into the Treasury * * *. This was clearly an implied recognition and ratification of the regulations, so far as any ratification on the part of Congress may have been necessary to their validity" (pp. 96-97).[4]

Where after years of debate Congress finally passed the Taylor Grazing Act including the restrictions of Section 3, it is artificial to charge that it ratified and ap-

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[4] The other three cases cited by petitioner wherein Congress subsequently made express reference to the rule in dispute are:

Isbrandtsen-Moller Co. v. *United States*, 300 U. S. 139. (Subsequent specific reference to "President's executive order #6166".)

Swayne & Hoyt, Ltd. v. *United States*, 300 U. S. 297 (same).

Duke Power Co. v. *Greenwood County*, 91 F. (2d) 665 (C. C. A. 4th, 1937), affd. 302 U. S. 484. (Subsequent appropriation for a list of Federal construction projects which contained the one in dispute.)

The other two cases cited by petitioner are *Street* v. *United States*, 133 U. S. 299, and *Wells* v. *Nickels*, 104 U. S. 444.

The *Street* case involved the legality of the President's mustering-out order of January 2, 1871, which Street contended, 17 years after his discharge, was invalid because authority to issue it had expired on January first. The court rejected this contention on four alternative grounds: (1) the discrepancy in dates was a technicality; (2) since January first had been a Sunday the President was entitled to exercise his authority on the next succeeding legal day; (3) the President was justified by other considerations; and (4) several subsequent acts of Congress reinstating to service

proved violations of this section because it appropriated moneys without consideration or debate as to Section 3. Indeed, the adoption of such a rule of ratification would require Congress to add to every appropriation of money to carry out the provisions of some administrative act, a proviso that the appropriation should not be construed as an approval of any act or thing done in violation of or not authorized by such former act.

2. *The Amendments of the Taylor Act by Act of June 26, 1936 Cannot Be So Construed.*

The amendatory act of June 26, 1936[5] related only to Sections 1, 7, 8, 10 and 15 of the Taylor Act.[6] Sections 2 and 3 were neither changed nor reenacted. The regulations of March 2, 1936 had been adopted only three months prior and their enforcement was in a preliminary stage and already the subject of legal attack (R. 1, 28).

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officers who had been mustered out by the order in question assumed the validity of the order.

In *Wells v. Nickels*, where for twenty years timber agents had exercised authority under a departmental letter to compromise timber depredations on the public lands, it was held (a) that the timber agent had authority to make a compromise; and (b) although the office of timber agent was not created by statute, "if any authority from Congress to do this was necessary, it may be fairly inferred from appropriations made to pay for the services of these special timber agents".

[5] Act of June 26, 1936, c. 842, 49 Stat. 1976.

[6] These amendments (1) extended the jurisdiction of the act from eighty to one hundred forty-two million acres; related (2) to the withdrawal of lands that were better suited for agricultural purposes than for forage crops, (3) to the gift of lands to the United States and the exchange of lands and the leasing of lands by the United States not adapted to grazing; and (4) to Section 10 concerning appropriation of moneys received.

The enlargement of the area subject to the Taylor Act cannot be construed as a ratification of the temporary licensing system because (1) Sections 2 and 3 were not the subject of reenactment or amendment; (2) at its prior session Congress had similarly enlarged the area but had refused to amend Section 3, though so requested by the Department of the Interior.[7] It is significant that the Department of the Interior did not seek legislative clarification of its authority as to licensing when the amendatory act was under discussion and its regulations under Section 2 about to be released. The principle of ratification by reenactment relates to a settled construction by an administrative body of a statute which is in fact reenacted.[8]

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[7] H. R. 3019, 74th Cong., 1st Sess.; see note p. *supra*. This bill suffered a pocket veto. (Cong. Rec., 74th Cong., 1st Sess., Vol. 79, Pt. 14, p. 761.)

[8] In the following cases cited by petitioner (Pet. Br. 55, 56) Congress subsequently passed statutes which reenacted or incorporated by reference the particular provision in the previous statute which had received an administrative construction. They are *United States* v. *Alexander*, 12 Wall. 177; *National Lead Company* v. *United States*, 252 U. S. 140; *McCaughn* v. *Hershey Chocolate Co.*, 283 U. S. 488; *Massachusetts Mutual Life Insurance Co.* v. *United States*, 288 U. S. 269, 273. In *Swigart* v. *Baker*, 229 U. S. 187, Congress in two other statutes incorporated the effect of the regulation in dispute.

The following cases cited by petitioner (Pet. Br. 56, note 76), illustrate that the weight to be given any administrative ruling is dependent upon the number of years in which it has been in effect. In *Alaska Steamship Co.* v. *United States*, 290 U. S. 256 (1933), Congress had appropriated money over a period of 35 years for the enforcement of the particular administrative practice in question (see pp. 261-261); in *Constanzo* v. *Tillinghast*, 287 U. S. 341 (1932), the Court pointed out that the pertinent rules of the Bureau of Immigration had been in force since 1917; in *Corning Glass Works* v. *Robertson*, 65 F. (2d) 476 (App. D. C. 1931), cert. den. 290 U. S. 645, the interpretation of the Commissioner of Patents had been followed for 27 years and enlarged rather than contracted remedies available to citizens.

3. *The Civil Relief Act of October 17, 1940 Cannot be So Construed.*

The Civil Relief Act is by its title remedial. In a field where priority and continuity of use is paramount, it would be inconceivable that Congress would penalize those entering military service by depriving them of the benefit of priority and continuity, regardless of its attitude as to the legality of the regulations.

III.

CONCLUSION

Wherefore, it appears that the Supreme Court of Nevada did not err and that its judgment should be affirmed.

April, 1941.

Respectfully submitted,

WILLIAM J. DONOVAN,
2 Wall Street,
New York, N. Y.

MILTON B. BADT,
Elko, Nevada,
Counsel for Respondents.

R. R. IRVINE,
New York, N. Y.

JOHN HOWLEY,
New York, N. Y.
Of Counsel.

SUPREME COURT OF THE UNITED STATES.

No. 718.—October Term, 1940.

L. R. Brooks, Petitioner,
vs.
Archie Dewar, et al.

On Petition for Writ of Certiorari to the Supreme Court of the State of Nevada.

[May 26, 1941.]

Mr. Justice Roberts delivered the opinion of the Court.

The respondents brought suit in a Nevada District Court to enjoin the petitioner from barring, or threatening to bar, them from grazing their livestock within Nevada Grazing District No. 1 in default of the payment of certain grazing fees and in default of their holding a license permitting such use of the public lands by them. The bill alleged that the respondents were, and for years had been, in the business of breeding, raising, grazing, and selling livestock within Nevada and within the district; that it was impossible for them to own or lease all the land needed for their business and they owned or leased a small portion of the required land and used vacant unappropriated and unreserved public lands of the United States to satisfy the remainder of their grazing requirements; that their financial and business necessities made it impossible to continue to operate if their ability to graze their livestock on the public range were seriously impaired or interfered with. They averred that, until May 31, 1935, they had been impliedly licensed by the United States to graze livestock on portions of the public range in Nevada.[1] They recited the passage by Congress of an Act of June 28, 1934,[2] and alleged that, on April 8, 1935, the Secretary of the Interior, in accordance with the provisions of the Act, established a grazing district known as Nevada Grazing District No. 1, which included portions of the public range upon which the respondents had theretofore grazed their livestock and that, on May 31, 1935, the Director of Grazing, with the approval of the Secretary, had promulgated rules which re-

[1] See Buford v. Houtz, 133 U. S. 320; Omaechevarria v. Idaho, 246 U. S. 343.

[2] c. 865, 48 Stat. 1269, as amended by Act of June 26, 1936, c. 842, 49 Stat. 1976, 43 U. S. C. Supp. V, § 315 *et seq.*

quired all persons grazing within the district to obtain temporary licenses so to do, for which no fees were to be paid; that, pursuant to the rules, the respondents obtained temporary licenses; that, on March 2, 1936, after an investigation by the Secretary, the Director of Grazing, with the approval of his superior, purporting to act under the authority of § 2 of the Act of June 28, 1934, promulgated rules for the administration of grazing districts, which provided for the issue of temporary licenses to expire on a date named in 1937 or upon the issue of permits provided for by § 3 of the Act, for which licenses graziers were to pay a fee of five cents per month for each head of cattle and a fee of one cent per month for each head of sheep for the privilege of grazing; that the rules further provided that, after issue of the temporary licenses, no stockman should graze livestock upon, nor drive them across, the public range within a grazing district without a license. The complaint recited that, about May 1, 1936, the respondents were notified by the Register of the District Land Office that licenses would be granted them upon payment of the first installment of the grazing fees and that shortly thereafter the defendant, Brooks, who was acting as Regional Grazier of the United States, notified the respondents that unless they paid the installments and obtained licenses by June 15th they would be considered in trespass under the terms of the Act of 1934 and would be punished by fine as provided in the Act. The respondents alleged with particularity the urgent necessity in the conduct of their business that they be permitted to graze their cattle on public lands and that, unless they can do so, they will suffer irreparable and serious damage due to the destruction of their businesses. The bill charges that although the Secretary in promulgating the rules with respect to temporary licenses purported to act under the authority of § 2 of the Act of 1934, that section confers upon him no power so to do and that grazing fees specified by the rules were fixed without any attempt to determine their amounts as required by § 3 of the Act and in violation of conditions prescribed by § 3.

The petitioner demurred and assigned as reasons that the complaint failed to state facts sufficient to constitute a cause of action against him; that there was a defect of parties defendant for failure to join the Secretary of the Interior; that as the United States,

an indispensable party, had not consented to be sued, the court was without jurisdiction; and that the subject matter of the complaint was exclusively within the political power of the United States and not subject to judicial review. The court overruled the demurrer, with leave to answer. The petitioner elected to stand upon his demurrer and the court thereupon entered a decree in favor of the respondents, which the Supreme Court of Nevada affirmed.[3] We granted certiorari because of the importance of the questions involved.

By § 1 of the Act of 1934, the Secretary of the Interior is authorized to establish grazing districts not exceeding in the aggregate an area of 80,000,000 acres out of certain unappropriated and unreserved public lands of the United States[4] if the lands, in his opinion, are chiefly valuable for grazing and raising forage crops. Before any district is created a hearing is to be held after notice at which officials and persons interested are to be heard. Section 2 provides:

"The Secretary of the Interior shall make provision for the protection, administration, regulation, and improvement of such grazing districts as may be created under the authority of the foregoing section, and he shall make such rules and regulations and establish such service, enter into such cooperative agreements, and do any and all things necessary to accomplish the purposes of this Act and to insure the objects of such grazing districts, namely, to regulate their occupancy and use, to preserve the land and its resources from destruction or unnecessary injury, to provide for the orderly use, improvement, and development of the range; . . . and any willful violation of the provisions of this Act or of such rules and regulations thereunder after actual notice thereof shall be punishable by a fine of not more than $500."

Section 3 authorizes the Secretary to issue permits to graze livestock in grazing districts "upon the payment annually of reasonable fees in each case to be fixed or determined from time to time." It commands that preference be given, in the issue of permits, to certain persons described in the section and that no permittee who complies with the rules and regulations of the Secretary shall be denied the renewal of his permit if such denial will impair the value of the permittee's grazing unit when such unit is pledged as

[3] — Nev. —, 106 P. (2d) 755.

[4] Increased to an aggregate of 142,000,000 acres by the amendatory Act of June 26, 1936, *supra*, Note 1.

security for any bona fide loan. The permits are to be for a period of not more than ten years subject to the preferential right of the permittee to renewal in the discretion of the Secretary. There are other provisions for adjustment of the amount of grazing to be permitted under the permits and a corresponding adjustment of the grazing fees in the case of the occurrence of range depletion due to natural causes.

By § 10 it is provided that all moneys received under the authority of the Act are to be deposited in the Treasury of the United States and twenty-five per cent. of such moneys received from any district in a fiscal year is made available, when appropriated by the Congress, for expenditure by the Secretary for range improvements and fifty per cent. of such money received from a district in any fiscal year is to be paid, at the end of the year, by the Secretary of the Treasury, to the state in which the grazing district is situated to be expended by the state for the benefit of the counties in which the district lies.[5]

The petitioner asserts that the judgment below should be reversed because the suit is one against the United States; because the Secretary of the Interior is an indispensable party, and because the State court was without power to enjoin a federal officer. He admits that earlier cases in this court are against his contention but relies on others which he says sustain his view. As this Court remarked nearly sixty years ago respecting questions of this kind, they "have rarely been free from difficulty" and it is not "an easy matter to reconcile all the decisions of the court in this class of cases."[6] The statement applies with equal force at this day. We are not disposed to attempt a critique of the authorities. Since the jurisdiction and the procedure of the court below is sustained by decisions of this Court, we are unwilling to base our judgment upon a resolution of asserted conflict touching issues of so grave consequence where, as here, the bill fails to make a case upon the merits.

The respondents say that, under the Act of 1934, the Secretary is powerless to grant temporary licenses and charge fees therefor; that his sole authority is to issue permanent permits for specified

[5] By § 11 provision is made for disposition of moneys received from districts located on Indian lands. Twenty-five per cent. is made available, when appropriated for expenditure by the Secretary for range improvement.

[6] Cunningham *v.* Macon & Brunswick R. R. Co., 109 U. S. 446, 451.

periods not to exceed ten years, at fees adjusted to the circumstances of individual permittees, and with preferential rights of renewal. If this view be correct it might well be years before the Secretary could place the users of lands in any district under permits. The petitioner asserts that it was not the intent of Congress that the grazing lands should go unregulated and without license for any such extensive period as would be required for the issue of permits under § 3. He relies on the broad powers conferred by § 2 and points out that the section is a replica of the statute involved in *United States* v. *Grimaud*, 220 U. S. 506, and there held to authorize similar rules and regulations.

With knowledge that the Department of the Interior was issuing temporary licenses instead of term permits and that uniform fees were being charged and collected for the issue of temporary licenses, Congress repeatedly appropriated twenty-five per cent. of the money thus coming into the Treasury for expenditure by the Secretary in improvements upon the ranges.[7] The information in the possession of Congress was plentiful and from various sources. It knew from the annual reports of the Secretary of the Interior that a system of temporary licensing was in force.[8] The same information was furnished the Appropriations Committee at its hearings.[9] Not only was it disclosed by the annual report of the Department that no permits were issued in 1936, 1937, and 1938, and that permits were issued in only one district in 1939, but it was also disclosed in the hearings that uniform fees were

[7] Act of June 22, 1936, c. 691, 49 Stat. 1757, 1758; Act of August 9, 1937, c. 570, 50 Stat. 564, 565; Act of May 9, 1938, c. 187, 52 Stat. 291, 292; Act of May 10, 1939, c. 119, 53 Stat. 685, 687; Act of June 18, 1940, c. 395, Pub. No. 640, 76th Cong., 3d Sess. The form of the Appropriations Act of June 22, 1936, is typical. It is: "For construction, purchase, and maintenance of range improvements within grazing districts, pursuant to the provisions of sections 10 and 11 of the Act of June 28, 1934 (48 Stat., p. 1269), and not including contributions under section 9 of said Act, $250,000: *Provided*, That expenditures hereunder in any grazing district shall not exceed 25 per centum of all moneys received under the provisions of said Act from such district during the fiscal years 1936 and 1937."

[8] Annual Report Secretary of the Interior 1936, pp. 16-17. *Id.*, 1937, pp. xii, 102, 105-107. *Id.*, 1938, pp. xv, 107.

[9] Hearings Subcommittee of House Committee on Appropriations on H. R. 10,630, 74th Cong., 2d Sess., pp. 13-15; Hearings Subcommittee of House Committee on Appropriations on H. R. 6958, 75th Cong., 1st Sess., pp. 80, 83, 89; Hearings Subcommittee of House Committee on Appropriations on H. R. 9621, 75th Cong., 3d Sess., pp. 65, 70, 71; Hearing Subcommittee of Senate Committee on Appropriations on H. R. 9621, 75th Cong., 3d Sess., pp. 3, 28, 29.

being charged and collected for the issue of temporary licenses. And members from the floor informed the Congress that the temporary licensing system was in force and that as much as $1,000,000 had been or would be collected in fees for such licenses.[10] The repeated appropriations of the proceeds of the fees thus covered and to be covered into the Treasury, not only confirms the departmental construction of the statute,[11] but constitutes a ratification of the action of the Secretary as the agent of Congress in the administration of the act.[12]

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

A true copy.

Test:

Clerk, Supreme Court, U. S.

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[10] 81 Cong. Rec., part 4, pp. 4570-4571; 83 Cong. Rec., part 11, p. 2376; 84 Cong. Rec., part 13, pp. 2931, 2932, 2933.

[11] Wells v. Nickles, 104 U. S. 444, 447.

[12] Isbrandtsen-Moller Co. v. United States, 300 U. S. 139, 147.